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CONCISE TREATISE

ON THE

LAW OF WILLS.

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JUNE, 1900.



A

CONCISE TREATISE

ON THE

LAW OF WILLS.

BY

H. S. THEOBALD,

OF THE INNER TEMPLE, ONE OF HER MAJESTY'S COUNSEL, AND  
FORMERLY FELLOW OF WADHAM COLLEGE, OXFORD.

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## PREFACE TO THE FIFTH EDITION.

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SINCE the last edition of this work the Land Transfer Act, 1897, has come into operation. The statute makes important changes in the law relating to testamentary disposition. Though the Act has now been in operation for more than two years, hardly any cases under it have come before the Courts. Sect. 4, which deals with executors' powers of appropriation, has been judiciously allowed to remain dormant by omitting to make rules under it.

The decisions upon the construction of wills have been numerous.

The Rule in Shelley's Case has again been considered by the House of Lords. It would be too much to expect that in future no doubt can arise upon the application of the Rule. It cannot be said that any new principles have been established by the cases.

The subject of Administration will be found more fully dealt with than in former editions. Some

chapters, for instance those on Election and Charities, have been in great measure re-written. On the other hand space has been gained by omitting some obsolete topics with reference to wills before the Wills Act.

The cases will be found noted down to June, 1900.

7, NEW SQUARE, LINCOLN'S INN.

*June, 1900.*

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# A CONCISE TREATISE ON WILLS.

## CHAPTER I.

### BY WHAT LOCAL LAW WILLS ARE REGULATED.

A WILL, so far as it relates to immovable property, must be made in accordance with the formalities required by the law of the land where the immovable property is situated.

Chap. I.

Will of  
immovables.

Immovable property for this purpose includes leaseholds; the validity and construction, therefore, of wills, so far as they affect leaseholds in England, must be governed by English law. *Freke v. Lord Carbery*, 16 Eq. 461; *In bonis Gentili*, I. R. 9 Eq. 541; *De Fogassieras v. Duport*, 11 L. R. Ir. 123; *Duncan v. Lawson*, 41 Ch. D. 394.

Leaseholds.

There appears to be a conflict of cases on the question whether proceeds of sale of immovables devised on trust for sale are governed by the *lex loci* or by the law of the domicile. In *Freke v. Lord Carbery* the Thellusson Act, which does not extend to Ireland, was held to render invalid certain trusts of the proceeds of sale of English leaseholds devised on trust for sale by a testator domiciled in Ireland. On the other hand, in *In re Piercy*; *Whitwham v. Piercy*, (1895) 1 Ch. 83, the trusts of the proceeds of sale of land in Sardinia devised on trust for sale by a testator domiciled in England were held to be subject to English law.

Proceeds of  
sale of  
immovables.

Wills of personalty made in execution of powers are valid, if made in accordance with the instrument creating the power

Will under  
power.

## Chap. I.

without reference to the domicile of the testator, subject of course to sect. 10 of the Wills Act, which enacts that no appointment shall be valid unless executed in accordance with the Act.

Thus, a will executed according to the Wills Act is a good execution of a power, though the will would be invalid according to the law of the testator's domicile. *Tatnall v. Hankey*, 2 Moo. P. C. 342; *In bonis Alexander*, 6 Jur. N. S. 354; 29 L. J. P. 93; 1 Sw. & T. 454, n.; *In bonis Hallyburton*, 1 P. & D. 90; *In bonis Huber*, (1896) P. 209, see *Pouey v. Hordern*, (1900) 1 Ch. 492; *In bonis Trefond*, 81 L. T. 56; overruling on this point, *Crookenden v. Fuller*, 1 Sw. & T. 441, 454.

The administration of a fund appointed under a general power in a Scotch will is subject to Scotch law, though the appointor may be a domiciled Englishman. *Re Bald*; *Bald v. Bald*, 76 L. T. 462.

A testamentary power to appoint personalty can be exercised by a will valid according to the law of the testator's domicile, but not executed according to the Wills Act. *D'Huart v. Harkness*, 34 L. J. Ch. 311; 11 Jur. N. S. 633; 34 B. 324; *In re Price*; *Tomlin v. Latter*, (1900) 1 Ch. 442.

*In re Kirwan's Trusts*, 25 Ch. D. 373, only decides that Lord Kingsdown's Act (see *infra*) does not affect sect. 10 of the Wills Act, which makes an appointment by will invalid if not executed in accordance with the Act. A will, therefore, admitted to probate by virtue only of Lord Kingsdown's Act, but not executed according to the Wills Act, does not exercise a testamentary power of appointment. See, too, per Lord Cranworth in *Dolphin v. Robins*, 7 H. L. p. 419; *Hummel v. Hummel*, (1898) 1 Ch. 642.

By 24 & 25 Vict. c. 114 (Lord Kingsdown's Act), which extends only to testamentary instruments made by persons dying after the 6th August, 1861, it is enacted:—

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being

Wills made out of the kingdom to be admitted to probate if made according to the law

admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin. See *In bonis De la Saussaye*, 3 P. & D. 42; *In bonis Donaldson*, 3 P. & D. 45; *In bonis Lacroix*, 2 P. D. 94; *In bonis Gatti*, 27 W. R. 928.

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of the place  
where made.

2. Every will and other testamentary instrument made within the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Wills made in  
the kingdom  
to be admitted  
if made  
according to  
local usage.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Change of  
domicile not  
to invalidate  
will.

Leaseholds are personal estate within the Act. *In re Watson*; *Carlton v. Carlton*, 35 W. R. 711.

The Act applies to British subjects only, and neither this Act nor sect. 2 of the Naturalization Act, 1870 (33 Vict. c. 14), enables an alien to make a will in English form, whether his domicile at the date of the will and death is foreign or English. *In bonis Von Buseck*, 6 P. D. 211; *S. C.*, *Bloxam v. Favre*, 8 P. D. 101; 9 *ib.* 130; *In bonis Keller*, 61 L. J. P. 39; 65 L. T. 763.

But a foreigner who has obtained letters of naturalization as a British subject is a British subject within the meaning of the Act. *In bonis Gally*, 1 P. D. 438.

In ascertaining the validity of testamentary papers the Court will apply the law of one country only at a time. Thus, where a codicil well executed in Italy according to Italian law was endorsed on an unexecuted will, but according to

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Italian law the codicil could not stand alone and could not confirm the will, it was held that Italian law could not be applied, so as to uphold the codicil, and English law, so as to confirm or republish the will, but that neither could be proved. *Pechell v. Hilderley*, 1 P. & D. 673.

By virtue of sect. 8 of the Act, the will in Scotch form of a person domiciled in Scotland, who afterwards marries there and then acquires an English domicile is not revoked, inasmuch as marriage does not revoke a will in Scotland. *In bonis Reid*, 1 P. & D. 74.

When there is no testamentary law in force in the place where the will is made, a will simply signed but not attested would probably be good. *Stokes v. Stokes*, 78 L. T. 50 (Congo Free State).

## Domicile.

The validity of wills of personal property, except in the case of British subjects dying after August, 1861, is governed by the law of the testator's domicile at the date of the death. *Anstruther v. Chalmers*, 2 Sim. 1; *Stanley v. Bernes*, 3 Hag. 373; *Price v. Dewhurst*, 8 Sim. 279; 4 M. & Cr. 76; *Preston v. Melville*, 8 Cl. & F. 1; *Craigie v. Lewin*, 3 Curt. 435; *De Zichy Ferraris v. Lord Hertford*, 3 Curt. 468; *Bremer v. Freeman*, 10 Moo. P. C. 306; *Enokhin v. Wylie*, 10 H. L. 1; see *Eames v. Hacon*, 16 Ch. D. 407.

Legislative changes in the law of the country, where the deceased was domiciled, made after his death, though with express reference to his will, cannot be considered in deciding upon the right to have the will proved in this country. *Lynch v. Provisional Government of Paraguay*, 2 P. & D. 268.

## Domicile governs administration and construction of will.

The administration of the personal property of a deceased person, whether a British subject or not, including the construction of his will, is governed by the law of his domicile at the time of his death unless the testator indicates that the will was intended to take effect with reference to some other law. *Enokhin v. Wylie*, 10 W. R. 467; 10 H. L. 1; see *Doglioni v. Crispin*, L. R. 1 H. L. 301; *Ewing v. Orr-Ewing*, 9 App. C. 34; 10 App. C. 453; *In re Hernando*; *Hernando v. Sawtell*, 27 Ch. D. 284; *In re Trufort*; *Trafford v. Blanc*, 36 Ch. D. 600; *In re Marsland*, 55 L. J. Ch. 581;



*Abd-ul-Messih v. Farra*, 13 App. C. 431, P. C.; *In re Price*; *Tomlin v. Latter*, (1900) 1 Ch. 442. Chap. I.

Where a Frenchman marries without a settlement so that the law of community of goods applies, the effect is the same as if he had executed a marriage settlement in accordance with that law, and if he dies domiciled in England he cannot dispose of his personal property in such a way as to interfere with the rights of the wife under the law of community of goods. *In re De Nicols*; *De Nicols v. Curlier*, (1900) A. C. 21; where *Lashley v. Hog*, 4 Pat. 581, is explained.

In matters of procedure, such as payment of interest on legacies, the Court follows its own practice. *Hamilton v. Dallas*, 38 L. T. 215. Procedure.

The question of domicile is independent of naturalization and allegiance. *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Haldane v. Eckford*, 8 Eq. 631; *Brunel v. Brunel*, 12 Eq. 299; *Douglas v. Douglas*, 12 Eq. 617. The following cases on this point are overruled—*Moorhouse v. Lord*, 10 H. L. 272; *In re Capdevielle*, 2 H. & C. 985; *A.-G. v. Countess de Wahlstatt*, 3 H. & C. 374; *Jopp v. Wood*, 34 B. 88; 13 W. R. 481; *Maltass v. Maltass*, 1 Rob. 67. Domicile independent of allegiance.

According to English law every person has a domicile. If a domicile of choice has not been acquired, the law attributes to him a domicile, which may be called his domicile of origin.

It has not been decided whether domicile of origin means the domicile at birth or the last domicile imposed by the choice of the father or other person having authority to change the domicile of an infant by changing his own. Meaning of domicile of origin.

The point was raised in *In re Craignish*; *Craignish v. Hewitt*, (1892) 3 Ch. 180.

The better opinion appears to be that domicile of origin is domicile at birth; see *Udny v. Udny*, L. R. 1 H. L. Sc. 441; see, however, Westlake's Private Int. Law, p. 312, § 261.

The domicile of origin of a legitimate child is that of its father, of an illegitimate child that of its mother. *Dalhousie v. Macdonall*, 7 Cl. & F. 817; *Munro v. Munro*, 7 Cl. & F. 842; *Re Patten*, 6 Jur. N. S. 151. Domicile of children.

After the death of their father the mother, so long as she

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remains a widow, has power to change the domicile of her infant children. They do not necessarily acquire her domicile. *Pottinger v. Wightman*, 3 Mer. 67; see *Johnston v. Beattie* 10 Cl. & F. 42, 66; *In re Beaumont*, (1893) 3 Ch. 490.

The power of the mother to change the domicile of her infant children apparently continues after her re-marriage. See *In re Beaumont*, *supra*; *Lamar v. Micon*, 112 U. S. Rep. 452; 114 U. S. Rep. 218.

It is doubtful whether a guardian can change an infant's domicile. *Douglas v. Douglas*, 12 Eq. 617, 625; *Lamar v. Micon*, *supra*.

Domicile of  
lunatic.

The domicile of a person who is a lunatic when he attains his majority, and so remains up to the time of his death, changes with that of his father in the case of a legitimate child, and with that of his mother in the case of an illegitimate child, when there is no committee of the person. *Sharpe v. Crispin*, 1 P. & D. 611.

Domicile of  
married  
woman.

The domicile of a married woman at any given time is the domicile of her husband at that time. *Warrender v. Warrender*, 2 Cl. & F. 488; *Dalhousie v. Macdougall*, 7 Cl. & F. 817; *Whitcomb v. Whitcomb*, 2 Curt. 351; *Dolphin v. Robins*, 7 H. L. 390; *Bell v. Kennedy*, L. R. 1 H. L. Sc. 907; *Harvey v. Farnie*, 8 App. C. 43.

The fact that the marriage is voidable makes no difference. *Turner v. Thompson*, 13 P. D. 37.

A married woman living apart from her husband under an agreement for a separation has no power to change her domicile by her own act. *Warrender v. Warrender*, 2 Cl. & F. 488; *In re Daly's Settlement*, 25 B. 456.

After a decree for a divorce the wife can select her own domicile. *Williams v. Dormer*, 2 Rob. 505.

It would seem that the same rule should apply after a judicial separation. See *Dolphin v. Robins*, 7 H. L., pp. 416, 420; *Le Sueur v. Le Sueur*, 1 P. D. 139; 2 P. D. 79.

Military  
service.

Persons entering the military service of any state acquire the domicile of that state. *President of United States v. Drummond*, 12 W. R. 701; 33 B. 449.

As to the civil service, see *Urquhart v. Butterfield*, 37 Ch. D. 377.

But the domicile of a person domiciled within the United Kingdom, for instance in Jersey, is not changed by entering the military service of the Crown. *Re Patten*, 6 Jur. N. S. 151; *Brown v. Smith*, 15 B. 444; *Yelverton v. Yelverton*, 29 L. J. P. 84; 1 Sw. & T. 574; *Ex parte Cunningham*; *In re Mitchell*, 13 Q. B. D. 418; *Re Macreight*; *Parton v. Macreight*, 30 Ch. D. 165.

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Entry into the service of the East India Company formerly effected a change of domicile. *Bruce v. Bruce*, 2 B. & P. 229, n.; 5 B. P. C. 566; *Munroe v. Douglas*, 5 Mad. 379; *Forbes v. Forbes*, Kay, 341; *Craigie v. Lewin*, 3 Curt. 435.

East India Company's service.

The Court does not recognise an Anglo-Chinese domicile. *In re Tootal's Trusts*, 23 Ch. D. 532.

Anglo-Chinese domicile.

The domicile of origin endures until an actual change is made by which another domicile is acquired. *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307; *Ommaney v. Bingham*, cit. 5 Ves. 757; *Somerville v. Lord Somerville*, 5 Ves. 749, 786; *Moore v. Budd*, 4 Hag. 346; *Munro v. Munro*, 7 Cl. & F. 842, 876; *Countess of Dalhousie v. Macdonall*, 7 Cl. & F. 817; *A.-G. v. Dunn*, 6 M. & W. 511; *De Bonneval v. De Bonneval*, 1 Curt. 856.

A domicile of choice is acquired by a person who fixes his sole or principal residence in a country which is not his country of origin with the intention of residing there for a period not limited as to time. *King v. Foxwell*, 3 Ch. D. 518; *Dreton v. Dreton*, 12 W. R. 946; *The Harmony*, 2 C. Rob. Ad. 322; *Bempde v. Johnstone*, 3 Ves. 198.

Domicile of choice.

Every presumption is to be made against the acquisition by an Englishman of a domicile of choice in such countries as China and Turkey, where there is a total difference of religion, customs, and habits. *The Indian Chief*, 3 C. Rob. Ad. 22, 29; *Maltass v. Maltass*, 1 Rob. 67; *In re Tootal's Trusts*, 23 Ch. D. 532.

China and Turkey.

Residence in a foreign state as a privileged member of an extra-territorial community destroys a domicile of choice acquired elsewhere, but does not create a new domicile; and persons residing in such communities retain or resume, as the case may be, their domicile of origin. *In re Tootal's*

Trading settlements.

**Chap. I.** *Trusts*, 23 Ch. D. 532; *Abd-ul-Messih v. Farra*, 13 App. C. 431, P. C.

Disability  
to acquire  
domicile of  
choice.

A person may by the duties of his position, or by his profession, be disqualified from acquiring a domicile of choice.

Thus it seems that an officer holding a commission from the Crown cannot acquire a new domicile unless he is on half-pay. *Craigie v. Lewin*, 3 Curt. 435; *Hodgson v. De Beauchere*, 12 Moo. P. C. 285; *Cockrell v. Cockrell*, 25 L. J. Ch. 730; *Re Macreight*; *Paxton v. Macreight*, 30 Ch. D. 165; see *The Lauderdale Peerage*, 10 App. C. 692.

Ambassador  
or peer.

But there is nothing in the position of an ambassador or peer of the realm to prevent the acquisition of a domicile of choice. *Heath v. Samson*, 14 B. 441; *A.-G. v. Kent*, 1 H. & C. 12; *Hamilton v. Dallas*, 1 Ch. D. 257.

Compulsory  
residence.

A domicile of choice can only be acquired by choice, therefore a compulsory residence abroad as a refugee, or to avoid creditors, will not effect a change of domicile, unless followed by voluntary adoption of the new domicile. *De Bonneval v. De Bonneval*, 1 Curt. 864; *Pitt v. Pitt*, 12 W. R. 1089; *In re Duleep Singh*; *Ex parte Cross*, 7 Morrell, 228; see *In re Martin*; *Loustalan v. Loustalan*, 48 W. R. 509.

Similarly residence abroad in the performance of a public duty, such as that of judge, military officer, or consul, does not in itself confer a foreign domicile. *A.-G. v. Roze*, 1 H. & C. 31; *A.-G. v. Napier*, 6 Ex. 217; *Sharpe v. Crispin*, 1 P. & D. 611.

Residence for  
sake of health.

A person compelled to go abroad for the sake of his health would probably not acquire a foreign domicile. See *Johnston v. Beattie*, 10 Cl. & F. 42, p. 138.

But where a foreign country is selected as a residence in the hope or opinion that it may be better suited to the health or constitution, a domicile of choice may be acquired. *Hoskins v. Matthews*, 8 D. M. & G. 13.

Domicile of  
choice con-  
stituted by  
completed  
intention.

Domicile of choice is a mixed question of intention and act; there must be an intention to reside permanently in a particular country, followed by actual residence. Where the intention is clear, length of residence would be immaterial.

Where there is no direct evidence of intention, length of

residence is material as showing what the intention was. See **Chap. I.**  
*In re Grove; Vaucher v. The Solicitor to the Treasury*, 40  
 Ch. D. 216.

Thus a fixed intention to adopt a certain place as a domicile,  
 followed by arrival at that place, would, it seems, at once con-  
 stitute that place a domicile. *Bell v. Kennedy*, L. R. 1 H. L.  
 Sc. 307.

The fact of residence in a particular place will not constitute *Quærens quo*  
 that place a domicile of choice so long as the person residing *se conferat.*  
 is in search of some permanent place of residence, and has not  
 made up his mind where it shall be. *Bell v. Kennedy*, L. R.  
 1 H. L. Sc. 307; *Whicker v. Hume*, 7 H. L. 124; *Re Patience*;  
*Patience v. Main*, 29 Ch. D. 976; see *In re Craignish*;  
*Craignish v. Hewitt*, (1892) 3 Ch. 180.

By permanent residence must be understood residence to *Permanent*  
 which no definite limit of time can be assigned. *residence.*

Thus residence abroad with a view to making a fortune will  
 effect a change of domicile. *Lyall v. Paton*, 25 L. J. Ch. 746;  
*Allardice v. Onslow*, 33 L. J. Ch. 434; see *Goulden v. Goulden*,  
 (1892) P. 240.

So an intention to reside in a country as long as another  
 person lives is in effect an intention to reside permanently.  
*Anderson v. Laneville*, 9 Moo. P. C. 325.

Where a person has in fact taken up a permanent residence *Intention to*  
 in a country, that country will be his domicile notwithstanding *return.*  
 an intention to retain his domicile of origin, or some other  
 domicile. *A.-G. v. Kent*, 1 H. & C. 12; *A.-G. v. Fitzgerald*,  
 3 Dr. 610; *In re Steer*, 3 H. & N. 594; *Doucet v. Geoghegan*,  
 26 W. R. 825; 9 Ch. D. 441. See, too, *Stanley v. Bernes*,  
 3 Hag. 373; *Anderson v. Laneville*, 9 Moo. P. C. 325; *In*  
*bonis Raffenel*, 3 Sw. & T. 42; *Stevenson v. Masson*, 17 Eq. 78.

Where a person has two residences, the place where he *Two*  
 usually resides with his wife and family will be considered his *residences.*  
 place of domicile. *Forbes v. Forbes*, Kay, 341; *Aitchison v.*  
*Diron*, 10 Eq. 589; *Platt v. A.-G. of New South Wales*, 3  
 App. C. 336; *D'Etchegoyen v. D'Etchegoyen*, 13 P. D. 132.

Where a domicile of choice is abandoned, the domicile of *Revival of*  
 origin is revived until a fresh domicile of choice is acquired. *domicile of*  
*origin.*

**Chap. I.** *The Indian Chief*, 3 C. Rob. Ad. 12; *In bonis Bianchi*, 3 Sw. & T. 16; *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *King v. Foxwell*, 3 Ch. D. 518; *In re Marrett*; *Chalmers v. Wingfield*, 36 Ch. D. 400; overruling *Munroe v. Douglas*, 5 Mad. 379, 405, so far as inconsistent.

By 24 & 25 Vict. c. 121, where a convention has been entered into with a foreign state willing to adopt the provisions of the Act, an order in Council may direct that no British subject resident in such state shall acquire a domicile there unless he shall have been resident there for a year, and shall have made a declaration of his intention to become domiciled there; and the subjects of the foreign state are to acquire a British domicile only after the same formalities have been gone through.

## CHAPTER II.

### GENERAL CHARACTERISTICS OF TESTAMENTARY INSTRUMENTS.

A GIFT intended to be testamentary can only be effectually made by an instrument duly executed as a will. Thus, a direction to give property to a person after the donor's death, where the donor retains full control of the property during his life, is invalid. *Powell v. Hellicar*, 26 B. 261; *Fletcher v. Fletcher*, 4 Ha. 79; *Hughes v. Stubbs*, 1 Ha. 481; *Maguire v. Dodd*, 9 Ir. Ch. 452; *Farquharson v. Cave*, 2 Coll. 356; *Gough v. Findon*, 7 Ex. 48. Chap. II.  
Testamentary  
gift.

In the same way a deed not intended to have any effect till the settlor's death is testamentary. *Consett v. Bell*, 1 Y. & C. C. 569; *Rigden v. Vallier*, 2 Ves. Sen. 253; *Dillon v. Coppin*, 4 M. & Cr. 647; *In bonis Morgan*, 1 P. & D. 214; *Fielding v. Walshaw*, 27 W. R. 492; *In re Robson*; *Emley v. Davidson*, 30 W. R. 257; *Milnes v. Foden*, 15 P. D. 105. Deed to take  
effect after  
death.

A voluntary settlement, though reserving to the settlor a life interest and containing a power of revocation, is not testamentary. *Thompson v. Browne*, 3 M. & K. 32. The case of *A.-G. v. Jones*, 3 Pr. 368, is overruled; see *Marjoribanks v. Horenden*, Dru. 11, 27, 29; *Sheldon v. Sheldon*, 1 Rob. 83; *Brown v. Adr.-G.*, 1 Macq. 79; see, too, *Hope v. Harman*, 11 Jur. 1097; *Hope v. Hope*, 10 B. 581. Voluntary  
settlement.

Similarly, an instrument coming into operation immediately, and of which no part is revocable, more especially if it involves anything in the nature of consideration, cannot take effect as a will. *In bonis Robinson*, 1 P. & D. 384; see *In bonis Halpin*, 1 R. 8 Eq. 567; *Thorncroft v. Lashmar*, 10 W. R. 783.

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Deed in part  
testamentary.

On the other hand, if a deed is in part clearly testamentary, such part may take effect as a will, though other parts are not testamentary. *Doe d. Cross v. Cross*, 8 Q. B. 714; see *Peacocke v. Monk*, 1 Ves. 127; *Belt*, 82; *Bagnall v. Downing*, 2 Lee, 8.

What may  
take effect as  
a will.

Any instrument executed in the manner required by the Wills Act may take effect as a will, provided the intention was that it should not operate till after the death of the donor.

Thus, the following instruments, being properly executed, have been allowed to take effect as testamentary dispositions:—

Orders on a savings bank, and on a banker. *In bonis Marsden*, 1 Sw. & T. 542; *Jones v. Nicolay*, 2 Rob. 288.

A cheque to take effect after death. *Bartholomew v. Henley*, 3 Phillim. 817.

A letter. *Denny v. Barton*, 2 Phillim. 575; *In bonis Mundy*, 2 Sw. & T. 119; 9 W. R. 171.

A paper containing wishes and a dying request. *In bonis Lowry*, 5 N. of C. 619; *In bonis Mundy*, 2 Sw. & T. 119.

A deed of gift to take effect at death. *Habergham v. Vincent*, 2 Ves. J. 204; 4 B. C. C. 355; *Thorold v. Thorold*, 1 Phillim. 1; *Shergold v. Shergold*, cit. *ib.* 10; *In bonis Montgomery*, 5 N. of C. 99; *In bonis Morgan*, 1 P. & D. 214; *Fielding v. Walshaw*, 27 W. R. 492.

An instrument to take effect two years “after my wife’s death if she survives me.” *In bonis News*, 7 Jur. N. S. 688.

Where there is nothing to show that an instrument has reference to the death of the person executing it, it cannot have effect as a will. *Glyn v. Oglander*, 2 Hag. 428; *King’s Proctor v. Daines*, 3 Hag. 218; *Shingler v. Pemberton*, 4 Hag. 359; *Marjoribanks v. Horenden*, Dru. 11.

Evidence of  
testamentary  
intention.

But evidence is admissible to show that a deed or other instrument of gift, which on the face of it is not testamentary, was not intended to operate till the death of the person executing it. *Cock v. Cooke*, 1 P. & D. 241; *Robertson v. Smith*, 2 P. & D. 43; *In bonis Coles*, 2 P. & D. 362; *In bonis Webb*, 3 Sw. & T. 482; 10 Jur. N. S. 709; *In bonis English*, 3 Sw. & T. 586; *In bonis Slinn*, 15 P. D. 156.

And, conversely, evidence is admissible to show that an



instrument on the face of it testamentary was not intended to be a will. *Nicholls v. Nicholls*, 2 Phillim. 183; *Lister v. Smith*, 3 Sw. & T. 282; *Trevelyan v. Trevelyan*, 1 Phillim. 149; *In bonis Nosworthy*, 11 Jur. N. S. 570.

An instrument, expressing merely an intention of instructing a solicitor to prepare a testamentary instrument with a view to make a particular legacy, will not take effect as a testamentary instrument, where there is no extraneous evidence of testamentary intention. *Corentry v. Williams*, 3 Curt. 787.

Intention to make will

A duly executed instrument described as instructions for a will may have effect as a will if it appears that it was intended to take effect in the absence of a more formal instrument. *Bone v. Spear*, 1 Phillim. 345; *Torre v. Castle*, 1 Curt. 303; 2 Moore P. C. 133; *Barwick v. Mullings*, 2 Hag. 225; *Hattatt v. Hattatt*, 4 Hag. 211; *Whyte v. Pollok*, 7 App. C. 400; see *Ferguson-Davie v. Ferguson-Davie*, 15 P. D. 109.

Instructions for will.

Wills are often expressed to be conditional upon the testator's death before a given period, such as return from a voyage or a military expedition, or the like, and if the condition is clearly expressed, the will does not take effect if the condition is not fulfilled. *Parsons v. Lanoc*, 1 Ves. Sen. 189; *In bonis Winn*, 2 Sw. & T. 147; *Roberts v. Roberts*, *ib.* 337; *In bonis Porter*, 2 P. & D. 22; *In bonis Robinson*, *ib.* 171; *Lindsay v. Lindsay*, *ib.* 459; *In bonis Hugo*, 2 P. D. 73.

Conditional wills.

On the other hand, if the will is so expressed as to show that the contingency is the motive which induces the testator to make the will, the will is not conditional. *Barton v. Collingwood*, 4 Hag. 176; *In bonis Thorne*, 4 Sw. & T. 36; *In bonis Dobson*, 1 P. & D. 88; *In bonis Mayd*, 6 P. D. 17; *Re Stuart*, 21 L. R. Ir. 105.

In other cases it may be gathered from the disposition of property and other circumstances that a will expressed to be conditional was intended to take effect without regard to the condition. *In bonis Martin*, 1 P. & D. 380; *In bonis Spratt*, (1897) P. 28, where the cases are discussed; *Halford v. Halford*, *ib.* 36.

Probate may be granted of a conditional codicil, as it may have the effect of republishing the will. *In bonis Silva*, 2 Sw. & T. 315.

Conditional codicil.

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A testator may make it conditional on the assent of a third person whether a testamentary instrument executed by him shall take effect or not. *In bonis Smith*, 1 P. & D. 717.

Will  
revocable.

A will is in all cases revocable, even though the testator may declare it to be irrevocable. *Vinyor's Case*, 8 Rep. 82a.

Covenant not  
to revoke.

A covenant not to revoke a will, or a covenant to execute a testamentary power of appointment, is a binding covenant, for breach of which an action will lie, though it cannot be specifically enforced. *Robinson v. Ommanney*, 28 Ch. D. 285; *In re Parkin*; *Hill v. Schwarz*, (1892) 3 Ch. 510.

## Joint wills.

Persons may make joint wills, which are, however, revocable at any time by either of them or by the survivor. *Hobson v. Blackburn*, 1 Add. 274; *In bonis Stracey*, Dea. & S. 6; *In bonis Lovegrove*, 2 Sw. & T. 453; *In bonis Fletcher*, 11 L. R. Ir. 359.

A joint will may be made to take effect after the death of both testators; and if the joint will is not a disposition by each testator of his own property, but a disposition of joint property after the death of the survivor, the will cannot be proved till the death of the survivor. *In bonis Raine*, 1 Sw. & T. 144.

In ordinary cases a joint will is looked upon as the will of each testator, and may be proved on the death of one. *In bonis Stracey*, 1 Jur. N. S. 1197; Dea. & S. 6; *In bonis Miskelly*, I. R. 4 Eq. 62, where *In bonis Raine* is disapproved; see *In bonis Piazzi Smyth*, 77 L. T. 375.

## Mutual wills.

It seems that two persons may agree to make mutual wills, which remain revocable during the joint lives by either with notice to the other, but become irrevocable after the death of one of them if the survivor takes advantage of the provisions made by the other. *Dufour v. Pereira*, 1 Dick. 419; 2 Harg. Jur. Arg. 272; 2 Harg. Jur. Ex. 101; see 3 Ves. 416; *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Denyssen v. Mostert*, L. R. 4 P. C. 236; *Dias v. De Livera*, 5 App. C. 123, P. C.

Promise to  
make a will.

For the effect of a promise to leave a person property by will, see *Maddison v. Alderson*, 8 App. C. 467; *Humphreys v. Green*, 10 Q. B. D. 148.

## CHAPTER III.

### TESTAMENTARY CAPACITY.

A TESTATOR must, at the time of making his will, have an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who have a claim to be the objects of his bounty, and the manner in which it is to be distributed. *Harwood v. Baker*, 3 Moo. P. C. 282; *Longford v. Purdon*, 1 L. R. Ir. 75.

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General  
capacity.

The question of sanity is a question of fact, and there is no presumption that a testator is sane till the contrary is shown. *Sutton v. Sadler*, 5 W. R. 880; 3 C. B. N. S. 87; *Symes v. Green*, 1 Sw. & T. 401; *Cleare v. Cleare*, 1 P. & D. 655.

Where a testator is subject to delusions with regard to persons who would be the natural objects of his testamentary bounty, his will made while he is under the influence of such delusions is invalid. *Dew v. Clark*, 3 Add. 79; 5 Russ. 163; *Waring v. Waring*, 6 Moo. P. C. 341; *Smith v. Tebbitt*, 1 P. & D. 398; *Boughton v. Knight*, 3 P. & D. 64.

Delusions.

Where a testator is subject to delusions, which leave the general power of understanding unaffected and are wholly unconnected with his testamentary dispositions, such delusions do not affect his capacity to make a will. *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Smee v. Smee*, 5 P. D. 84; see *Jenkins v. Morris*, 14 Ch. D. 674; *Murfett v. Smith*, 12 P. D. 116; *Hope v. Campbell*, (1899) A. C. 1.

A will made by a testator after he has been insane must be shown to have been made after his recovery or in a lucid interval. *Groom v. Thomas*, 2 Hagg. 438; *A.-G. v. Parnter*,

**Chap. III.** 3 B. C. C. 443; *Hall v. Warren*, 9 Ves. 611; *Waring v. Waring*, 6 Moo. P. C. 341.

**Lucid interval.** Upon the question whether a will was made during a lucid interval, the rational character of the will, where it is prepared by the testator without assistance, is evidence to show that it was made in a lucid interval. *Cartwright v. Cartwright*, 1 Phillim. 90, 100; *White v. Driver*, 1 Phillim. 88; *Brogden v. Brown*, 2 Add. 445; *Ayrey v. Hill*, 2 Add. 210.

Every person of sound mind and not under some special disability may make a will.

**Infants.** A will made by a person under twenty-one (unless he is a soldier in actual military service, or a mariner or seaman at sea), is invalid. 1 Vict. c. 26, s. 7; Sugd. R. P. Stat. 330.

**Married Women's Property Act, 1882.** Under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sect. 1 (1), a married woman may dispose by will, of any real or personal property as her separate property, as if she were a *feme sole*.

**Married Women's Property Act, 1893.** And sect. 3 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), enacts that "section 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband."

The Act was passed on the 5th December, 1893. No time is fixed for its commencement; it therefore takes effect from the date of the passing of the Act. Sect. 3 is not in terms limited to the wills of married women who die after the passing of the Act; but no doubt it must be so limited. It is not limited to wills made after the passing of the Act. *In re Wylie*; *Wylie v. Moffat*, (1895) 2 Ch. 116.

**Effect of Married Women's Property Act, 1882.** As regards a woman married before the 1st January, 1883, sect. 5 of the Act of 1882 makes any property her title to which accrues after that date her separate estate, and therefore disposable by will. If the title whether vested or contingent or in reversion accrues before that date, the Act does not apply. *Reid v. Reid*, 31 Ch. D. 402.

Where property comes to a married woman under a bequest

to next of kin to be ascertained at a certain time, her title accrues at that time, and not at the testator's death. *In re Parsons*; *Stockley v. Parsons*, 45 Ch. D. 51.

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The Act of 1882 did not enlarge the testamentary capacity of married women, except in so far as it converted certain property into separate estate, which was not separate estate before the Act.

Thus a woman married before the Act, could not by a will made during the coverture dispose of property, her title to which accrued before the Act, and the Act did not enable a married woman by a will made during the coverture to dispose of property accruing to her after the coverture. *In re Cuno*; *Mansfield v. Mansfield*, 43 Ch. D. 12; *In re Price*; *Stafford v. Stafford*, 28 Ch. D. 709; *In re Taylor*; *Whitby v. Highton*, 57 L. J. Ch. 490; 58 L. T. 842; 36 W. R. 683.

This is now altered by the Act of 1893; see *supra*.

Before the Married Women's Property Act, 1882, a married woman had no power to make a will except in the following cases:—

Powers of married women before the Act.

A married woman, who was an executrix, could make a will and appoint an executor for the purpose of continuing the representation to the original testator. *Scammell v. Wilkinson*, 2 East, 552; *Birkett v. Vandercom*, 3 Hagg. 750; *In bonis Richards*, 1 P. & D. 156.

1. Might continue representation to an estate.

A married woman might by a will made in exercise of a power dispose of the legal estate and the equitable interest in lands and of personal estate. *Driver v. Thompson*, 4 Taunt. 294; *Willock v. Noble*, L. R. 7 H. L. 580; *In re Austis*; *Chetwynd v. Morgan*, 31 Ch. D. 596.

2. Will under power.

A power of making a testamentary appointment given to a woman by a settlement made on her first marriage, might be exercised during that or any subsequent marriage. *Burnett v. Mann*, 1 Ves. Sen. 156; *Hawksley v. Barrow*, 1 P. & D. 147.

In the case of realty, where a married woman having appointed by will under a power survived her husband and took a conveyance to herself, the conveyance has been held to execute the power and to revoke the will. *Lawrence v. Wallis*, 2 B. C. C. 319.

Whether power destroyed by conveyance.

## Chap. III.

In the case of personalty, however, it has been held that where a married woman having made a will under a power survived her husband and took an assignment of the fund over which the power extended from the trustees, the will was nevertheless valid. *Dingwell v. Askew*, 1 Cox, 427; *Clough v. Clough*, 3 M. & K. 296. These cases are probably open to reconsideration.

## 3. Will of separate estate.

A married woman could dispose by will of personal estate and of the beneficial interest in real estate when settled to her separate use. *Taylor v. Meads*, 10 Jur. N. S. 166; 34 L. J. Ch. 208; 4 D. J. & S. 597; *Pride v. Bubb*, 7 Ch. 64; *Hall v. Waterhouse*, 10 Jur. N. S. 361; 5 Giff. 64; see *Dye v. Dye*, 13 Q. B. D. 147.

A restraint upon anticipation affecting *corpus* does not prevent a disposition by will. *Re Currey*; *Gibson v. Wey*, 56 L. T. 80.

## After-acquired separate estate.

Though the married woman had no separate estate at the date of the will, the will took effect as regards after-acquired separate estate. *Charlemont v. Spencer*, 11 L. R. Ir. 347, 490.

Property which becomes the separate estate of a married woman under the Married Women's Property Act, is for this purpose on the same footing as her other separate estate. *In re Bowen*; *James v. James*, (1892) 2 Ch. 291.

The legal estate not being affected by the separate use could not be disposed of by will.

## Savings.

The accumulations of property belonging to a married woman for her separate use, made during coverture, whether by herself or a trustee for her, are separate estate. *Mayd v. Field*, 3 Ch. D. 587; *In re Wilson*; *Menteith v. Campbell*, 26 W. R. 848; *In bonis Tharp*, 3 P. D. 76.

## Separate use to arise on contingency.

In Ireland it has been held that property given to a married woman for her separate use on the event of the insolvency of her husband, could not be disposed of before the husband became insolvent. *Mara v. Manning*, 2 J. & Lat. 311; 8 Ir. Eq. 218; *Bestall v. Bunbury*, 13 Ir. Ch. 318; *Keays v. Lane*, 1 I. R. 3 Eq. 1; see *In re Smallman's Estate*, 1 I. R. 8 Eq. 249. But the doctrine of these cases is not consistent with English authorities.

Where a married woman had a power to appoint if she should not survive her husband, and an absolute interest to her separate use if she survived him, a will made during coverture, expressed to be in virtue of the power and of every other power enabling her, took effect upon the separate estate if she survived her husband. *Bishop v. Wall*, 3 Ch. D. 194.

A married woman might, with her husband's assent, dispose by will of personal property not settled to her separate use and over which she had no power of appointment. *Willock v. Noble*, L. R. 8 Ch. 778; 7 H. L. 580.

4. Will *ex assensu viri*.

It was necessary that the assent of the husband should be given to the particular will with knowledge of its contents.

It was said in *Noble v. Willock*, 8 Ch. p. 790, that the husband might withdraw his assent until he had either assented to probate or had acted upon the will.

But an assent to the probate of the will once given after the wife's death could not be withdrawn. *Maas v. Sheffield*, 1 Rob. 364; *In bonis Cooper*, 6 P. D. 34; *Chappell v. Charlton*, 56 L. J. P. 78; 57 L. T. 496.

Probate is now granted of the will of a married woman without any exception or limitation, and the husband is not, by proving the will, to be deemed to have assented to the will as a disposition of property which could only be disposed of with his assent. *In re Atkinson*; *Waller v. Atkinson*, (1899) 2 Ch. 1; see *In bonis Leman*, (1898) P. 215; *In bonis Davis*, W. N. 1899, 61.

The will of a married woman, in so far as it requires her husband's assent, becomes invalid by his death in her lifetime, whether he has assented to it or not. *Price v. Parker*, 15 Sim. 198; *Trimmell v. Fell*, 19 B. 537; *Willock v. Noble*, L. R. 7 H. L. 580; *In re Wilson*; *Menteith v. Campbell*, 26 W. R. 848.

Assent revoked by death.

The wife of a person banished for life by Act of Parliament (a), or attainted (b), and the wife of an alien enemy (c), and of a convict transported for life, though he has received a conditional pardon (d), is for testamentary purposes a *feme sole* as regards property vested in her after her husband's disability has been incurred. *Countess of Portland v. Prodgers*,

5. Wife of exile and felon.

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2 Vern. 104 (a); *Newsome v. Bowyer*, 3 P. W. 37 (b); *Deerly v. Mazarine*, 1 Salk. 116 (c); *Re Martin*, 2 Rob. 405; 15 Jur. 686; *In bonis Coward*, 11 Jur. N. S. 569; 24 L. J. P. 120 (d).

The wife of a convict transported for years would seem to be in the same position notwithstanding *Coombs v. Queen's Proctor*, 2 Rob. 547, which was not decided on the ground that the sentence was only for years and is inconsistent with *Re Harrington's Trusts*, 29 B. 24; *Atlee v. Hook*, 23 L. J. Ch. 776.

## 6. Protection order.

A married woman who had obtained a protection order could make a will as if she were a *feme sole*, and the order related back to the date of the desertion. *In bonis Elliott*, 2 P. & D. 274.

But the husband might oppose grant of probate on the ground that the protection order was obtained by fraud. *Mudge v. Adams*, 6 P. D. 54; *Mahoney v. McCarthy*, (1892) P. 21.

## Limit of testamentary power of married woman.

In cases not within the Married Women's Property Act, 1893, the will of a married woman made during coverture is ineffectual to pass property coming to her after the coverture and not given to her separate use.

Thus such a will does not pass property coming to her under her husband's will, or property settled upon her absolutely if she survives her husband, or the dividends received after the husband's death upon stock settled upon her for life for her separate use, or stock standing in the joint names of husband and wife and coming to the wife by survivorship. *Willock v. Noble*, L. R. 7 H. L. 581; *In re Cuno*; *Mansfield v. Mansfield*, 43 Ch. D. 12; *Mayd v. Field*, 3 Ch. D. 587; *In re Wilson*; *Menteith v. Campbell*, 26 W. R. 848; *In bonis Tharp*, 3 P. D. 76; *In re Young*; *Trye v. Sullivan*, 28 Ch. D. 705.

As already stated, the Married Women's Property Act, 1882, did not alter the law in this respect. But the Act of 1893 has now done so.

## Aliens.

By the Naturalization Act, 1870 (33 Vict. c. 14), which is not retrospective, real and personal property may be taken, acquired, held, and disposed of by an alien in the same



manner in all respects as by a natural-born British subject. Chap. III.  
 See *Sharp v. St. Sauveur*, 7 Ch. 343; *De Geer v. Stone*, 22 Ch. D. 243.

There appears never to have been any testamentary incapacity as such, affecting traitors, felons or suicides. They were not incapable of making wills, they were only incapable of disposing of such property as was forfeited for their offence.

Thus a *felo de se* could make a will of realty which was not forfeited, and could also appoint an executor by will. *Norris v. Chambres*, 7 Jur. N. S. 59; *In bonis Bailey*, 2 Sw. & T. 156.

By 33 & 34 Vict. c. 23, forfeiture and escheat for treason and felony are abolished, and sect. 8 enacts that every convict shall be incapable during the time while he shall be subject to the operation of the Act of alienating or charging any property, or of making any contract. See *Ex parte Graves*; *In re Harris*, 19 Ch. D. 1.

Sects. 9—17 contain provisions for the administration of the convict's property by administrators, and sect. 18 provides that the property shall be invested and accumulated for the benefit of the convict and his heirs and legal personal representatives, and shall revert in the convict upon his ceasing to be subject to the operation of the Act, or his heirs or legal personal representatives.

The Act appears to leave the testamentary power of a convict untouched, and it would seem therefore that a convict may now dispose of his property by will.

By 42 & 43 Vict. c. 59, s. 3, outlawry in any civil proceeding is abolished. Outlawry.

Traitors,  
felons, and  
suicides.

Forfeiture  
abolished.

## CHAPTER IV.

## REQUISITES FOR A VALID WILL.

**Chap. IV.** No will can be valid of which the testator does not know and approve the contents. *Barry v. Butlin*, 2 Moo. P. C. 480; *In bonis Duane*, 8 Jur. N. S. 752; 31 L. J. P. 173; *Sutton v. Sadler*, 3 C. B. N. S. 87; 26 L. J. C. P. 284; *Hastilow v. Stobie*, 1 P. & D. 64; *Cleare v. Cleare*, *ib.* 655; *In bonis Hunt*, 23 W. R. 553; 3 P. & D. 250; overruling *Cunliffe v. Cross*, 3 Sw. & T. 97; 32 L. J. P. 68.

Knowledge of contents.

Delegation of testamentary power.

A testator cannot, therefore, delegate his testamentary power to another person; that is to say, he cannot adopt and execute a will made for him without knowing its contents. *Hastilow v. Stobie*, 1 P. & D. 64; *Cleare v. Cleare*, *ib.* 655. See *ante*, p. 14.

But a will prepared in accordance with the testator's instructions is valid, though at the time of execution the testator remembers only that he has given instructions and believes the will to be in accordance with them. *Parker v. Felgate*, 8 P. D. 171.

Legatee preparing will must prove knowledge.

Whenever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, it is for those who propound the will to remove such suspicion. *Barry v. Butlin*, 2 Moo. P. C. 480; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Brown v. Fisher*, 63 L. T. 465; *Tyrrell v. Paynton*, (1894) P. 151.

The fact that the will is prepared by or on the instructions of the person taking a benefit under it is a circumstance raising such suspicion. *Paske v. Ollatt*, 2 Phillim. 323; *Ingram v. Wyatt*, 1 Hagg. 388; *Billinghurst v. Vickers*,

1 Phillim. 187; *Baker v. Batt*, 2 Moo. P. C. 317; *Scouler v. Plowright*, 5 W. R. 99; 10 Moo. P. C. 440; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Hegarty v. King*, 5 L. R. Ir. 249; 7 *ib.* 18; *Parker v. Duncan*, 62 L. T. 642. See *Donnelly v. Broughton*, (1891) A. C. 435, P. C. Chap. IV.

But the influence of a person standing in a fiduciary relation to the testator may lawfully be exercised to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent; and the burden of proof of undue influence lies upon those who assert it. *Hindson v. Wetherill*, 6 D. M. & G. 301; *Walker v. Smith*, 29 B. 394; *Parfitt v. Lawless*, 2 P. & D. 462. Fiduciary relation.

The rules therefore applicable in the case of gifts *inter vivos* to persons standing in a fiduciary relation to the donor do not apply to wills. In the case of gifts *inter vivos*, such persons have to show that not only the donor intended to give, but that his intention was not influenced by the donee, a burden of proof which in most cases it is practically impossible to discharge, at any rate so long as the fiduciary relation subsists.

To establish a case of undue influence, it must be shown that fraud or coercion has been practised on the testator in relation to the will itself, not merely in relation to other matters or transactions. *Boyse v. Rossborough*, 6 H. L. 2; *Hall v. Hall*, 1 P. & D. 481; *Wingrove v. Wingrove*, 11 P. D. 81. See *Longford v. Purdon*, 1 L. R. Ir. 75. Undue influence.

A case of undue influence is more easily established where there is evidence to show that the person influenced was of feeble mental capacity or in a weak state of health. *Hampson v. Guy*, 64 L. T. 778.

If a testator is prevented by threats from altering his will the Court of Probate may, if the case is proved, declare the persons exercising the coercion trustees of the benefits they take under the will. *Betts v. Doughty*, 5 P. D. 26.

A will which has been read over to the testator, or the contents of which have been brought to his notice before execution, must, in the absence of fraud or coercion, be presumed to have been approved by him. *Guardhouse v. Blackburn*, 1 P. & D. 109; *Goodacre v. Smith*, *ib.* 359; *Atter v.* Will read over.

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*Atkinson, ib.* 665; *Rhodes v. Rhodes*, 7 App. C. 192; *Beamish v. Beamish*, (1894) 1 I. R. 7.

Fraud and  
mistake.

Words or clauses introduced into a will by fraud, accident, or mistake, without the knowledge of the testator, will be struck out of the will, although their rejection may affect the sense of the words which remain. *In bonis Wray*, I. R. 10 Eq. 267; *In bonis Duane*, 2 Sw. & T. 590; 31 L. J. P. 173; *In bonis Oswald*, 3 P. & D. 162; *Morrell v. Morrell*, 7 P. D. 68; *Rhodes v. Rhodes*, 7 App. C. 192; *In bonis Boehm*, (1891) P. 247; *In bonis Gordon*, (1892) P. 228; *In bonis Moore*, (1892) P. 378; *In bonis Snowden*, 75 L. T. 279.

And clerical errors made in the engrossment have been corrected by substituting the right words. *In bonis Bushell*, 13 P. D. 7; *In bonis Huddleston*, 63 L. T. 255. See, however, *In bonis Walkeley*, 69 L. T. 419.

But where a testator has executed a will with knowledge of the contents, nothing can be added or omitted after his death on the ground of mistake. *In bonis Dary*, 1 Sw. & T. 262; *Guardhouse v. Blackburn*, 1 P. & D. 109; *Harter v. Harter*, 3 P. & D. 11; *Collins v. Elstone*, (1893) P. 1; *Beamish v. Beamish*, (1894) 1 Ir. 7.

Where a residuary legatee prepares the will and is directed to give further legacies which he purposely omits, and at the time when the will is read over and executed the further legacies are not present to the mind of the testator as the residuary legatee knows, the will will nevertheless be admitted to probate. *Mitchell v. Gard*, 3 Sw. & T. 75.

The remedy in such a case would appear to be to have the residuary legatee declared a trustee so far as regards the legacies omitted. As to whether such a declaration must be obtained in the Probate Division at the time when the will is proved, see *post*, p. 75.

Omission of  
scandalous  
passages.

The Court has, it seems, power to direct a passage containing a gross libel to be omitted from the probate copy of the will, though it will not exercise the power merely on the ground that the charge is offensive and untrue. *In bonis Wartnaby*, 1 Rob. 423; *Marsh v. Marsh*, 1 Sw. & T. 528, 536 (passages

omitted). *Curtis v. Curtis*, 3 Add. 33; *In bonis Honywood*, **Chap. IV.**  
2 P. & D. 251 (omission refused).

By the Wills Act (1 Vict. c. 26), sect. 8, it is enacted that no will shall be valid unless it shall be in writing and executed in manner thereinafter mentioned. **Wills Act, s. 8.**

The requirements as to execution are as follows:—in the first place the will must be signed at the foot or end thereof by the testator or by some other person in his presence or by his direction. **1. Signature by testator.**

The signature of the testator must be intended as an act of execution of the will. A signature to each page of the will, where the last page is left unsigned, is not *primâ facie* a sufficient execution. *Sweetland v. Sweetland*, 4 Sw. & T. 6; *Burke v. Moore*, 1 R. 9 Eq. 609; *In bonis Maddock*, 3 P. & D. 169. **Intention to execute.**

The mark of the testator is a sufficient signature, whether he can write or not. *Baker v. Dening*, 8 A. & E. 94; *Wilson v. Beddard*, 12 Sim. 28; *In bonis Bryce*, 2 Curt. 325; *In bonis Amiss*, 2 Rob. 116; *In bonis Douce*, 2 Sw. & T. 593; *In bonis Clarke*, 1 Sw. & T. 22. **Mark.**

A stamped name is sufficient. *Jenkyns v. Gaisford*, 3 Sw. & T. 93; 11 W. R. 854.

Signature in an assumed name is sufficient. *In bonis Glover*, 5 N. of C. 553; *In bonis Ridding*, 2 Rob. 339; *In bonis Clarke*, 1 Sw. & T. 22; *In bonis Douce*, 2 ib. 593. **Assumed name.**

A seal is not sufficient. *Smith v. Evans*, 1 Wils. 313; *Grayson v. Atkinson*, 2 Ves. Sen. 459; *Ellis v. Smith*, 1 Ves. Jun. 13, 15; *Wright v. Wakeford*, 17 Ves. 459. The case of *Lemayne v. Stanley*, 3 Lev. 1; 1 Freem. 538, is overruled. **Seal.**

But a seal with the testator's initials, and acknowledged as his hand and seal, is sufficient. *In bonis Emerson*, 9 L. R. Ir. 443.

Passing a dry pen over a written signature is not enough. *Casement v. Fulton*, 5 Moo. P. C. 130; *Playne v. Scriven*, 1 Rob. 772; see *Keril v. Lynch*, 1 R. 9 Eq. 249. **Dry pen.**

Another person, though he may be also an attesting witness, may by the testator's direction sign the testator's name, or impress a stamp with the testator's name engraved on it, or **Signature by agent.**

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sign his own name on behalf of the testator. *Jenkyns v. Gaigford*, 11 W. R. 854; 3 Sw. & T. 93; *Clarke's Case*, 2 Curt. 329; *In bonis Bailey*, 1 Curt. 914; *Smith v. Harris*, 1 Rob. 262.

Connection of  
signature  
with will.

The sheets of which a will consists need not be severally signed by the testator nor be connected together, but they must be in the same room where the execution took place. *Gregory v. Queen's Proctor*, 4 N. of C. 620; *Marsh v. Marsh*, 1 Sw. & T. 528; *Bond v. Seawell*, 3 Burr. 1773.

And the signature must be physically connected with the will. *In bonis Horsford*, 3 P. & D. 211; *In bonis M'Key*, 1 R. 11 Eq. 220.

Position of  
signature.

By the Wills Act Amendment Act, 1852 (15 & 16 Vict. c. 24), sect. 1, it is provided that a will shall be valid if the signature shall be so placed at or after or following or under or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*a*), and no will shall be affected by the circumstance that the signature shall not follow, or be immediately after the foot, or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation (*b*), either with or without a blank space intervening, or shall follow (*c*) or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause, or paragraph, or disposing part of the will shall be written (*d*) above the signature, or by the circumstance that there shall appear to be sufficient space (*e*) on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written to contain the signature. *In bonis Jones*, 34 L. J. P. 41; 4 Sw. & T. 1; *In bonis Williams*, 1 P. & D. 4; *In bonis Coombs*, 1 P. & D. 302; *In bonis Fuller*, (1892) P. 377; *In bonis Ffrench*, 23 L. R. Ir. 433 (*a*); *In bonis Walker*, 2 Sw. & T. 354; *In bonis Casmore*, 1 P. & D. 653; *In bonis*

*Pearn*, 1 P. D. 70 (b); *In bonis Puddephatt*, 2 P. & D. 97; *In bonis Horsford*, 3 P. & D. 211 (c); *In bonis Wright*, 30 L. J. P. 104; 4 Sw. & T. 35; *Hunt v. Hunt*, 1 P. & D. 209; *In bonis Archer*, 2 P. & D. 252; *In bonis Wotton*, 3 P. & D. 159; *Royle v. Harris*, (1895) P. 163; *In bonis Gilbert*, 78 L. T. 762 (d); *In bonis Williams*, 1 P. & D. 4 (e).

The same section enacts that no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made. See *In bonis Greator*, 2 Jur. N. S. 1172; *In bonis Dallow*, 1 P. & D. 189; *In bonis Ainsworth*, 2 P. & D. 151; *In bonis Dearle*, 39 L. T. 93; *In bonis Arthur*, 2 P. & D. 273; *In re White*, (1896) 1 Ir. 269.

Words under  
signature.

It is a question of fact whether a disposition is underneath or follows a signature. For instance, if a testator begins halfway down the page and fills the lower part of the page and then goes to the top of the same page and signs below what he last writes, then as the part first written is in context anterior to the signature it may be considered as following that context. *In bonis Kempton*, 3 Sw. & T. 427.

And in some cases words following the signature, but connected with the will by asterisks, have been treated as interlineations and admitted to probate. *In bonis Birt*, 2 P. & D. 214; *In bonis Greenwood*, (1892) P. 8.

If the signature of the testator intended to be in execution of the will is followed by words intended to form part of the will, effect may be given to the part of the will preceding the signature, if that part in effect constitutes the whole of the dispositive portion of the will. *Keating v. Brooks*, 2 Curt. 421; 4 N. of C. 260; *In bonis Davis*, 3 Curt. 748; *In bonis Cotton*, 6 N. of C. 307; 1 Rob. 658; see *In bonis Topham*, 7 N. of C. 272; 2 Rob. 189; *Sweetland v. Sweetland*, 4 Sw. & T. 6 (in which case the question was whether there was a due execution of any part of the will); *In bonis Wray*, 31 W. R. 476; *In bonis Anstee*, (1898) P. 283.

The same rule applies if the words following the signature contain unimportant bequests or appoint executors only. *In*

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*bonis Standley*, 7 N. of C. 69; 1 Rob. 755; *In bonis Amis*, 7 N. of C. 274; 2 Rob. 116.

Signature in the middle or in the margin of the will is not a sufficient signature. *Margary v. Robinson*, 12 P. D. 8; *In bonis Hughes*, 12 P. D. 107.

2. Signature must be witnessed.

In the second place, the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.

The signature of the testator must be written or acknowledged by the testator in the presence of both witnesses together, before either of them attest and subscribe the will. *In bonis Allen*, 2 Curt. 331; *In bonis Olding*, *ib.* 865; *In bonis Byrd*, 3 *ib.* 117; *Moore v. King*, *ib.* 243; *Pennant v. Kingscote*, *ib.* 643; *In bonis Summers*, 2 Rob. 295; *Cooper v. Bockett*, 3 Curt. 648; 4 Moo. P. C. 419; *Hindmarsh v. Charlton*, 1 Sw. & T. 433; 8 H. L. 160; *Wyatt v. Berry*, (1893) P. 5.

Will not void for incompetency of witness.

The Wills Act (1 Vict. c. 26), sect. 14, provides that if any person who shall attest the execution of a will shall, at the time of the execution thereof or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not, on that account, be invalid.

Sect. 15 enacts in effect that a will attested by a beneficiary under the will is valid, though the gift to the attesting witness is void. See pp. 108, 109.

Sect. 16 enacts that, in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Sect. 17 enacts that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will or a witness to prove the validity or invalidity thereof.

α. Signature made in presence of witnesses.

Where the testator writes something on the will in the presence of the witnesses summoned to attest the will, it will be presumed that he wrote his signature, though the witnesses



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may not see the signature and may not know that the document is his will. *Smith v. Smith*, 1 P. & D. 143; see *Wright v. Sanderson*, 9 P. D. 149; *Woodhouse v. Balfour*, 13 P. D. 2.

The acknowledgment may be by gestures. *In bonis Davies*, 2 Rob. 337; *In bonis Owston*, 10 W. R. 410.

Acknowledgment by a third person in the hearing of the testator, and acquiesced in by him, is an acknowledgment by the testator. *In bonis Jones*, Dea. & Sw. 3; *In bonis Bosanquet*, 2 Rob. 577; *Faulds v. Jackson*, 6 N. of C., supp. 12; *Inglesant v. Inglesant*, 3 P. & D. 172; *In bonis Bishop*, 30 W. R. 567.

It is clear that if the will is acknowledged to be the testator's will, and the witnesses see the signature of the testator, that is sufficient. *In bonis Dinmore*, 2 Rob. 641; *In bonis Philpot*, 3 N. of C. 2.

There is no sufficient acknowledgment, if the signature of the testator is covered up, so that the attesting witnesses do not see it. *Hudson v. Parker*, 1 Rob. 14; *In bonis Gunstan*; *Blake v. Blake*, 7 P. D. 102, overruling *Gwillim v. Gwillim*, 3 Sw. & T. 200; 29 L. J. Prob. 31; *Beckett v. Howe*, 2 P. & D. 1.

It seems there may be a sufficient acknowledgment, if the testator's signature might have been seen by the witnesses, if they had looked, though they may swear that they did not in fact see it. *In bonis Gunstan*; *Blake v. Blake*, 7 P. D. 102; see *Kelly v. Keatinge*, I. R. 5 Eq. 175; *Lloyd v. Roberts*, 12 Moo. P. C. 158; *Cooper v. Bockett*, 4 Moo. P. C. 419; *Blake v. Knight*, 3 Curt. 547; *In bonis Huckvale*, 1 P. & D. 375; *In bonis Pearn*, 1 P. D. 71.

A request to sign a paper not declared to be a will, when the witnesses see the signature of the testator, though it is not acknowledged by him as his signature, is sufficient. *Keigwin v. Keigwin*, 3 Curt. 607; *Gaze v. Gaze*, 3 Curt. 451; *In bonis Ashmore*, 3 Curt. 756; *In bonis Thompson*, 4 N. of C. 643; *Faulds v. Jackson*, 6 N. of C., suppl. 1; *Leech v. Bates*, 6 N. of C. 704; *Inglesant v. Inglesant*, 3 P. & D. 172; *Daintree & Butcher v. Fasulo*, 13 P. D. 67, 102; see, however, *In bonis Arthur*, 2 P. & D. 273.

b. Acknowledgment of signature already made.

Will acknowledged; signature seen.

Will acknowledged; signature not seen.

Signature seen; will not acknowledged.

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Signature not  
seen; will not  
acknowledged.

But a mere request to witnesses to attest an instrument, the nature of which is not explained to them, and the signature to which they do not see, is not sufficient. *In bonis Ashton*, 5 N. of C. 548; *In bonis Rawlins*, 2 Curt. 326; *In bonis Hammond*, 3 Sw. & T. 90; *In bonis Harrison*, 2 Curt. 863; *In bonis Pearson*, 33 L. J. P. 177; *Ilott v. Genge*, 3 Curt. 160; 4 Moo. P. C. 265; *Hudson v. Parker*, 1 Rob. 14; *In bonis Trinder*, 3 N. of C. 275; *Shaw v. Neville*, 1 Jur. N. S. 408; *In bonis Swinford*, 1 P. & D. 630; *Pearson v. Pearson*, 2 P. & D. 451; *Fischer v. Popham*, 3 P. & D. 246.

When the testator's will is signed by some other person by his direction, the signature must be acknowledged by the testator in presence of two witnesses; it is not sufficient that the witnesses see the signature written if they are not present when the testator directs the signature to be made, and the will is not acknowledged as a will. *Burke v. Moore*, 1 R. 9 Eq. 609.

3. Signature  
by witnesses.

In the third place, such witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation is necessary.

Witnesses  
need not sign  
in each other's  
presence.

The witnesses must subscribe in the presence of the testator, but they need not subscribe in the presence of each other. *White v. British Museum*, 6 Bing. 310; *Faulds v. Jackson*, 6 N. of C., suppl. 1; *In bonis Webb*, 1 Jur. N. S. 1096; 2 *ib.* 309; *Sullivan v. Sullivan*, 3 L. R. Ir. 299; see *Casement v. Fulton*, 5 Moo. P. C. 14.

Presence of  
the testator.

The witnesses will be considered to have subscribed in the presence of the testator if, under the circumstances, the testator might have seen them if he had chosen to look, though he may not have seen them. *Shires v. Glascock*, 2 Salk. 688; *Davy v. Smith*, 3 Salk. 395; *Todd v. Winchelsea*, M. & Malk. 12; 1 C. & P. 488; *Casson v. Dade*, 1 B. C. C. 99; *Doe v. Manifold*, 1 M. & S. 249; *Winchelsea v. Wauchope*, 3 Russ. 441; *In bonis Newman*, 1 Curt. 914; *In bonis Ellis*, 2 *ib.* 395; *Newton v. Clarke*, 2 *ib.* 320; *In bonis Colman*, 3 *ib.* 118; *Tribe v. Tribe*, 7 N. of C. 132; 1 Rob. 775; *Norton v. Bazett*, Dea. & Sw. 259; 2 Jur. N. S. 766; 3 Jur. N. S. 1084; *In bonis Trimmell*, 11 Jur. N. S. 248; *In bonis Piercy*, 1 Rob. 278; *Jenner v. Finch*, 5 P. D. 106.

The signatures of the witnesses need not be in any particular part of the will, if it appears that they were intended to attest the operative signature of the testator. *In bonis Davis*, 3 Curt. 748; *In bonis Chamney*, 1 Rob. 757; *Roberts v. Phillips*, 4 E. & B. 450; *In bonis Wilson*, 1 P. & D. 269; *In bonis Pearse*, 1 P. & D. 382; *In bonis Braddock*, 1 P. D. 433; *In bonis Streatley*, (1891) P. 172.

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Position of signatures.

But the signatures, if not on the same paper as the will, must be on a paper physically connected with it. *In bonis West*, 12 W. R. 89; *In bonis Saunders*, 31 L. J. P. 53; *Cook v. Lambert*, 32 L. J. P. 93; 3 Sw. & T. 46; *In bonis Gausden*, 2 Sw. & T. 362; *In bonis M'Key*, I. R. 11 Eq. 220; *In bonis Braddock*, 1 P. D. 433.

Signatures must be connected with will.

Where the testator signs the will, and the witnesses sign a duplicate, the will is not sufficiently attested. *In bonis Hatton*, 6 P. D. 204.

The witnesses must attest the signature, which is intended as an execution of the will; and where there are several signatures, the attestation of any but that intended as an execution of the will is invalid to give effect to the will or any part of it. *In bonis Martin*, 6 N. of C. 694; 1 Rob. 712; *Ewen v. Franklin*, Deane, 7; 1 Jur. N. S. 1220; *Sweetland v. Sweetland*, 4 Sw. & T. 6; 34 L. J. P. 42; 13 W. R. 504; *Phipps v. Hale*, 3 P. & D. 166; *In bonis Dilkes*, 3 P. & D. 164.

Witnesses must attest operative signature.

The attesting witnesses must subscribe with the intention, that the subscriptions made should be a complete attestation of the will, and evidence is admissible to show whether such was the intention or not. *In bonis Wilson*, 1 P. & D. 269; *In bonis Sharman*, 1 P. & D. 661; *Griffiths v. Griffiths*, 2 P. & D. 300; *In bonis Murphy*, I. R. 8 Eq. 300.

Intention to attest.

Adding an address to, or correcting a signature already made, or writing a christian name when the witness is unable to complete his signature, is insufficient. *In bonis Trevanion*, 2 Rob. 315; 14 Jur. 919; *Hindmarsh v. Charlton*, 1 Sw. & T. 433; 8 H. L. 160; *In bonis Maddock*, 3 P. & D. 169; *M'Conville v. M'Creesh*, 3 L. R. Ir. 73.

So a witness writing the name of a second witness opposite the mark of the latter cannot be said to subscribe. *In bonis Eynon*, 3 P. & D. 92.

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A signature made without any intention of attesting will be excluded from probate. *In bonis Sharman*, 1 P. & D. 661; *In bonis Murphy*, 1 R. 8 Eq. 300; *In bonis Smith*, 15 P. D. 2.

Form of  
signature.

Witnesses need not sign by name; initials, or a description, or a mark, are sufficient. *In bonis Christian*, 2 Rob. 110; 7 N. of C. 265; *In bonis Martin*, 6 N. of C. 694; *In bonis Sperling*, 3 Sw. & T. 272; 12 W. R. 354; *In bonis Amiss*, 2 Rob. 116; *In bonis Ashmore*, 3 Curt. 756.

But a seal is insufficient. *In bonis Byrd*, 3 Curt. 117.

One witness cannot sign for another. *In bonis White*, 2 N. of C. 461; *In bonis Middleton*, 33 L. J. P. 16; *Re Duggins*, 39 L. J. P. 24.

Nor can a third person sign for a witness. *In bonis Cope*, 2 Rob. 335; *Pryor v. Pryor*, 20 L. J. P. 114.

And a witness cannot sign in the name of another person. *In bonis Leverington*, 11 P. D. 80.

But a witness or a third person may guide the hand of the second witness, or may subscribe for the witness if the witness holds the top of the pen while the signature is being made. *Harrison v. Elvin*, 3 Q. B. 117; 2 G. & D. 769; *In bonis Frith*, 4 Jur. N. S. 288; 27 L. J. P. 6; *In bonis Lewis*, 31 L. J. P. 153; 7 Jur. N. S. 688; see *In bonis Kilcher*, 6 N. of C. 15.

The papers found at the testator's death to compose his will must, in the absence of proof to the contrary, be presumed to be the will executed by him. *Gregory v. Queen's Proctor*, 4 N. of C. 620; *Marsh v. Marsh*, 1 Sw. & T. 528; *Rees v. Rees*, 3 P. & D. 84.

## CHAPTER V.

### ALTERATIONS, INTERLINEATIONS, AND ERASURES.

It is immaterial that the will contains blank spaces or even a blank page. *Corneby v. Gibbons*, 1 Rob. 705 ; *In bonis Rice*, I. R. 5 Eq. 176 ; *In bonis Wotton*, 3 P. & D. 159. **Chap. V.**  
Blank spaces.

Oral and written declarations of a testator made before or after the execution of the will are admissible in evidence for the purpose of showing what were the constituent parts of the will at the time of execution. *Gould v. Lakes*, 6 P. D. 1.

Where a will contains obliterations, additions, or other alterations, evidence must, if possible, be produced to show when they were made. *In bonis Hindmarch*, 1 P. & D. 307 ; *In bonis Duffy*, I. R. 5 Eq. 506 ; *Moore v. Moore*, I. R. 6 Eq. 166 ; *In bonis Tqge*, 66 L. T. 60. Evidence  
when altera-  
tions made.

For this purpose declarations of the testator with regard to his testamentary intentions made before the date of the will are admissible. *Doë v. Palmer*, 16 Q. B. 747 ; *In bonis Sykes*, 3 P. & D. 26 ; *Dench v. Dench*, 2 P. D. 60.

The fact that a date earlier than the date of the will is annexed to alterations is not alone sufficient to show that they were made before execution. *In bonis Adamson*, 3 P. & D. 253.

As to the proper inference where there is evidence that some at least of the alterations in a will were made before execution, see *Williams v. Ashton*, 1 J. & H. 115 ; *Moore v. Moore*, I. R. 6 Eq. 166 ; *Doherty v. Dwyer*, 25 L. R. Ir. 297.

Alterations made in ink before execution will be presumed T.W. Presumption  
as to altera-  
tion.  
D

**Chap. V.** to be final. *Gann v. Gregory*, 3 D. M. & G. 780; *Ibbott v. Bell*, 35 B. 395.

Deliberative alterations.

Alterations made before execution in pencil, the will being written in ink, are *prima facie* deliberative, and the original writing will have effect. *Hawkes v. Hawkes*, 1 Hag. 322; *Edward v. Astley*, *ib.* 490; *Ravenacroft v. Hunter*, 2 *ib.* 68; *Parkin v. Bainbridge*, 3 Phillim. 321; *Lavender v. Adams*, 1 Add. 403; *Bateman v. Pennington*, 3 Moo. P. C. 223; *Francis v. Grover*, 5 Ha. 39; *In bonis Hall*, 2 P. & D. 256; *In bonis Adams*, *ib.* 367. See *In bonis Bellamy*, 14 W. R. 501.

Presumption as to date of alteration.

Alterations and additions made in a will complete without them must be presumed, in the absence of evidence, to have been made after the execution of the will or any subsequent codicil. *Cooper v. Bockett*, 4 N. of C. 685; 4 Moo. P. C. 419; *Simmons v. Rudall*, 1 S. N. S. 115; *Greville v. Tylee*, 7 Moo. P. C. 320; *Gann v. Gregory*, 3 D. M. & G. 780; *Doe v. Palmer*, 16 Q. B. 747; *Williams v. Ashton*, 1 J. & H. 115; *Christmas v. Whinyates*, 3 Sw. & T. 81; *In bonis Sykes*, 3 P. & D. 26.

Alterations and additions made in a will which would be incomplete without them, must be presumed to have been made before execution. *In bonis Cadge*, 1 P. & D. 543; *Birch v. Birch*, 1 Rob. 675; 6 N. of C. 581; *In bonis Swinden*, 2 Rob. 192; *Greville v. Tylee*, 7 Moo. P. C. 320; *In bonis Birt*, 2 P. & D. 214; *In bonis Adams*, *ib.* 367; *In bonis King*, 23 W. R. 552. See, however, *In bonis White*, 30 L. J. P. 55.

Alterations after date of will and before codicil.

Interlineations and alterations made in a will which is afterwards confirmed by a codicil are admitted to probate if it appears from the codicil or otherwise that they were made before the execution of the codicil. *Tyler v. Merchant Taylors'*, 15 P. D. 216; *In bonis Heath*, (1892) P. 253.

Wills Act, s. 21.

The Wills Act (1 Vict. c. 26), sect. 21, enacts that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration

shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

An alteration opposite which the testator and two witnesses have set their initials in the margin is sufficiently executed under this section. *In bonis Blewitt*, 49 L. J. P. 31; 5 P. D. 116; see, too, *In bonis Treeby*, 3 P. & D. 242; *In bonis Shearn*, 50 L. J. P. 15.

A sentence commenced on the second page and carried over to the third was admitted to probate, though the testator and witnesses had initialled only the second page. *In bonis Wilkinson*, 6 P. D. 100.

Where the original is completely obliterated and not ascertainable, the will must be considered blank, so far as the obliteration, interlineation or other alteration is concerned. *In bonis Ibbetson*, 2 Curt. 337; *Townley v. Watson*, 3 Curt. 761; *In bonis James*, 1 Sw. & T. 238; *Doherty v. Dwyer*, 25 L. R. Ir. 297.

Obliteration  
complete.

The Court will only endeavour to discover the original by the use of glasses or similar means, and not by the use of chemicals, or removal of any substance from the will. *In bonis Bearan*, 2 Curt. 369; *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, I. R. 6 Eq. 569; *In bonis Brasier*, 1899) P. 36. See *Lushington v. Onslow*, 6 N. of C. 183; *Ffinch v. Combe*, (1894) P. 191.

But where a testatrix wrote something on the back of a codicil and subsequently pasted a piece of blank paper over the writing, it was held that the paper might be removed. *In bonis Gilbert*, (1893) P. 183.

It appears to be clear that no external evidence would be admitted to show what the original words were, except in a case of dependent relative revocation (see *post*, p. 41). *In bonis*

Chap. V.     *Horsford*, 3 P. & D. 211; *In re Nelson*, I. R. 6 Eq. 569. See  
*Townley v. Watson*, 3 Curt. 761; *Jeffery v. Cancer Hospital*,  
57 L. T. 600.

The decision of the Probate Division upon a question of interlineation will be adopted upon a question relating to a devise of realty under the same will. *In re Cruttenden*; *Darey v. Lansdell*, 30 W. R. 57.



## CHAPTER VI.

## REVOCATION.

SECT. 18 of the Wills Act enacts that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

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Will to be  
revoked by  
marriage.

As to the adoption by foreigners of English law, when they marry in England, see *Loustalan v. Loustalan*, 81 L. T. 459, rev. 48 W. R. 509.

Where a will made in exercise of a power which would not be revoked by marriage disposes of other property of the testator, it will be revoked by marriage only so far as regards the property not subject to the power. *In bonis Russell*, 15 P. D. 111.

A will, though made in contemplation of marriage, is revoked by marriage. *In bonis Cadycold*, 1 Sw. & T. 34; *Marston v. Doe d. Fox*, 8 A. & E. 14; *Israell v. Rodon* 2 Moo. P. C. 51.

A will made in exercise of a power is not revoked by marriage where the heir, executor, or administrator, or statutory next of kin, would not in all events take in default of appointment. *In bonis Fenwick*, 1 P. & D. 319; *In bonis Worthington*, 20 W. R. 260.

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Will under  
power.

Nor is such a will revoked by marriage if the persons taking in default of appointment, though they may in fact be

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the heir or statutory next of kin of the donee of the power, do not take in that capacity under the instrument creating the power.

Thus the will is not revoked if the gift in default of appointment is to children of the testator, or to the next of kin simply instead of statutory next of kin. *In bonis Fitzroy*, 1 Sw. & T. 183; *In bonis McVicar*, 1 P. & D. 671; see *In bonis Russell*, 15 P. D. 111.

Where the limitation of real estate in default of appointment is to the donee, her heirs or assigns, the will is revoked by marriage. *Vaughan v. Vanderstegen*, 2 Dr. 165, 168.

No will to be  
revoked by  
presumption.

By the Wills Act (1 Vict. c. 26), sect. 19, it is enacted that no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstances.

No will to be  
revoked but  
by another  
will or codicil,  
or by destruc-  
tion.

Sect. 20 enacts that "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same."

Where a will has been destroyed against the wishes of a testator, it is doubtful whether he can subsequently ratify such destruction. *Mills v. Millward*, 15 P. D. 20.

As to what constitutes a "writing declaring an intention to revoke the same," see *In bonis Gosling*, 11 P. D. 79.

A statement in the attestation clause of a codicil that a previous codicil is revoked does not revoke the codicil. *In bonis Atkinson*, 8 P. D. 165.

Revocation  
while insane  
invalid.

Revocation while the testator is of unsound mind is ineffectual, though he may subsequently recover. *Borlase v. Borlase*, 4 N. of C. 106; *Brunt v. Brunt*, 3 P. & D. 37; *In bonis Hine*, (1893) P. 282.

A will left in the possession of a testator who subsequently becomes insane, and revoked by him, must be shown to have

been revoked while he was of sound mind. *Harris v. Berrall*, 1 Sw. & T. 153; *Sprigge v. Sprigge*, 1 P. & D. 608.

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Revocation is in all cases a question of intention, and if the act done, though in itself sufficient to revoke a testamentary instrument, can be shown to have been done for a purpose other than revocation, it will not revoke the instrument.

Act of destruction not done *animo revocandi*.

Thus destruction of a will on the erroneous supposition that it is invalid (a), or that it has been revoked or become useless (b), or that another instrument is valid (c), will not revoke the will. *Giles v. Warren*, 2 P. & D. 401; *In bonis Thornton*, 14 P. D. 82 (a); *Scott v. Scott*, 1 Sw. & T. 258; *Clarkson v. Clarkson*, 2 Sw. & T. 497; 31 L. J. P. 143; *In bonis Middleton*, 3 Sw. & T. 583; 10 Jur. N. S. 1109; *Beardsley v. Lacey*, 78 L. T. 25 (b); *Hyde v. Hyde*, 1 Eq. Ab. 409; *Onions v. Tyrer*, 1 P. W. 345; *Perrott v. Perrott*, 14 East, 423; *Dancer v. Crabb*, 3 P. & D. 98 (c).

Some of the cases above cited have been called cases of dependent relative revocation. They are really cases in which there was no *animus revocandi* whatever. The instruments were destroyed, not with a view to revoke them, but because the testator thought they had been revoked.

In the same way the destruction of a codicil which has revived a revoked will, will not revoke the will if it appears that the codicil was destroyed on the supposition that the will would still stand. *James v. Shrimpton*, 1 P. D. 431.

So, too, an act of destruction done merely for the purpose of making a fair copy of the will, or to improve the handwriting, has no revocatory effect. *In bonis Kennett*, 2 N. R. 461; *In bonis Applebee*, 1 Hag. 144; *In bonis Tozer*, 2 N. of C. 11.

A revocation made with a view of making or reviving some other disposition will only take effect if such other disposition is effectually made or revived. *Onions v. Tyrer*, 1 P. W. 343; 2 Vern. 742; Prec. Ch. 459; 1 Eq. Ab. 408; *Ex parte Ilchester*, 7 Ves. 348, 372; *Lord Thynne v. Stanhope*, 1 Add. 52.

Dependent relative revocation.

But to bring the case within this doctrine it must appear that the testator considered the substitution of some valid disposition as part of the act of revocation at the time when the act was done.

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The mere revocation of a will, followed by a subsequent ineffectual disposition, will not set up the original will if the two acts are not so connected, that it can be said the substitution of an effectual disposition was the condition of the revocation of the original will. *In bonis Mitcheson*, 32 L. J. P. 202; *In bonis Weston*, 1 P. & D. 633; *In bonis Gentry*, 3 P. & D. 80.

The point in these cases is not, that a revoked will is set up again, if a subsequent disposition is ineffectual, but that the original will is not itself intended to be revoked, unless or until an effectual disposition of the property is made. See *Powell v. Powell*, 1 P. & D. 209; *In bonis Weston*, 1 P. & D. 633; *Eckersley v. Platt*, 1 P. & D. 281; *Cossey v. Cossey*, 69 L. J. P. 17.

In cases of revocation the intention of the testator may always be proved by evidence.

Will revoked  
to make fresh  
will.

Thus, if a will is shown to have been cancelled for the purpose of making a fresh will, the original will is not revoked if no fresh will is made. *In bonis De Bode*, 5 N. of C. 189; *In bonis Eccles*, 2 Sw. & T. 600.

Nor, under similar circumstances, is the old will revoked if the fresh will, though made, is not effectual. *Hyde v. Mason*, Vin. Abr. Devise, R. 2, pl. 17; Com. 451; 1 Lee, 423, n. (a); *Dancer v. Crabb*, 3 P. & D. 98.

To set up  
prior will.

Similarly, a will cancelled in order to set up a prior will which cannot be so set up, is not thereby revoked. *Powell v. Powell*, 1 P. & D. 209; see *Dickinson v. Swatman*, 4 Sw. & T. 205; *Eckersley v. Platt*, 1 P. & D. 281; *In bonis Weston*, 1 P. & D. 633; *Welch v. Gardner*, 51 J. P. 760.

Perhaps where a will is cancelled upon the execution of another invalid instrument which differs from the cancelled will only in matters of detail, such as the persons appointed trustees, the fact that the dispositions in the two documents are the same would, even in the absence of express evidence of intention, be sufficient to show that the prior will was only intended to be revoked if the second instrument was effectual. See *Onions v. Tyrer*, 1 P. W. 343; *Short v. Smith*, 4 East, 419; *In bonis Middleton*, 3 Sw. & T. 583.

Upon the same principle, when the amount of a bequest is obliterated after the execution of the will, and a different, even though it may be a smaller, amount is written over or interlineated, the substituted bequest being incapable of taking effect, the original bequest remains, the inference being that it was the testator's intention to revoke the original bequest only if the substituted bequest was effectually made. *Brooke v. Kent*, 3 Moo. P. C. 334, overruling *In bonis Brooke*, 2 Curt. 343; *Soar v. Dolman*, 3 Curt. 121, overruling *S. C. nom. In bonis Rippin*, 2 Curt. 332; *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, I. R. 6 Eq. 569; *Sturton v. Whellock*, 31 W. R. 382; see *Kirke v. Kirke*, 4 Russ. 435; *Locke v. James*, 11 M. & W. 901; *Winson v. Pratt*, 2 B. & B. 650. The case of *In bonis Livock*, 1 Curt. 906, is overruled.

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Obliteration  
of part of  
legacy.

In such a case evidence is admissible to show what the original legacy was, and if necessary the Court will employ chemical means to ascertain it. *In bonis Horsford*, *supra*—see *ante*, p. 35.

If there is an erasure simply, without any substitution or interlineation, the doctrine does not apply, even though the erasure may be of part of a legacy—as for instance, where a legacy of one hundred and fifty pounds is given, and the words “and fifty” are erased. *In bonis Ibbetson*, 2 Curt. 337; *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, I. R. 6 Eq. 569.

Erasure  
without  
interlineation.

Upon similar principles, when the name of an executor has been obliterated and another executor substituted after the execution of the will, the name of the original executor will be restored, if it can be shown by external evidence what the name was. The presumption that the testator intended to appoint some executor or other is a strong one. *In bonis Parr*, 29 L. J. P. 70; 6 Jur. N. S. 56; *In bonis Harris*, 1 Sw. & T. 536; 29 L. J. P. 79; *In bonis Greenwood*, (1892) P. 7.

Erasure of  
name of  
executor.

Where the name of a legatee is obliterated, and that of another legatee substituted after execution, and there is no further evidence of intention, no case of dependent relative revocation arises. Under such circumstances, however, a case of dependent relative revocation may be raised by proper evidence.

Erasure of  
name of  
legatee.

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Thus, if it appears from external evidence that a gift has been made to a person only on the supposition by the testator that another person was incapable of taking, and after the execution of the will the name of the first person has been obliterated and the name of the second substituted, the original legatee takes on the ground that he was intended to take in the event of the substituted legatee being incapable of taking. *In bonis McCabe*, 3 P. & D. 94.

Distinction  
between cases  
of probate  
and cases of  
construction.

The cases on the doctrine of dependent relative revocation so far discussed have been cases in the Probate Court, where evidence of testamentary intention is always admissible.

Precisely the same doctrine applies in a Court of Construction, the only difference being that the intention to revoke a former gift only if a subsequent gift is effectually made must appear on the face of the instrument. No external evidence to prove the dependency of the two gifts is admissible.

Thus, if a legacy is given by will to A, and by a codicil the legacy to A is revoked, and the same legacy is given to B, who predeceases the testator, or for other reasons is incapable of taking, the legacy to A is nevertheless revoked. There is in such a case nothing to show that the legacy to A was only to be revoked if the legacy to B was effectually made, or in other words, no case of dependent relative revocation is made out. *French's Case*, Rolle's Ab. Devise, O. 4; *Tupper v. Tupper*, 1 K. & J. 665; *Nevill v. Boddam*, 28 B. 554; *Quinn v. Butler*, 6 Eq. 225; *Baker v. Story*, 23 W. R. 147.

Incapacity of  
beneficiary.

It has been said that the doctrine of dependent relative revocation has no application, where the second disposition fails not from the infirmity of the instrument, but from the incapacity of the beneficiary. 1 Jarm. 156, 3rd ed.; 1 Wms. Exors. 9th ed. 131.

But this is a mere distinction of fact and not of principle. It may even be doubted whether it reconciles the cases in fact. See *Quinn v. Butler*, 6 Eq. 225. The true theory seems to be, that the doctrine of dependent relative revocation applies equally where the second legatee is incapacitated from taking, provided the case can be brought within the doctrine, or in other words, provided it can be shown that the original legacy

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was intended to be revoked only in the event of the second taking effect. The mere fact that a legacy is revoked and a different legacy to a different legatee substituted, affords no argument either in the Court of Probate or in a Court of Construction that the capacity of the second legatee to take was the condition of the revocation of the earlier legacy.

A subsequent will is no revocation of a former one if the contents of the later will are unknown, or if, though it is known that the later will differed from the former one, it is unknown in what respects it differed. *Hitchins v. Basset*, 3 Mod. 204; 2 Salk. 592; Show. P. C. 146; *Dickinson v. Stidolph*, 11 C. B. N. S. 341, 357; *Hellier v. Hellier*, 9 P. D. 237; see *McAra v. McCay*, 23 L. R. Ir. 198; see also 19 Ind. Ap. 87.

Subsequent will—contents unknown.

Where there are several testamentary instruments which are not inconsistent, they will together be considered the will of the testator so far as they are not inconsistent. *In bonis Budd*, 3 Sw. & T. 196; *Berks v. Berks*, 4 Sw. & T. 23; *Lemage v. Goodban*, 1 P. & D. 57; *In bonis Fenwick*, *ib.* 319; *In bonis Griffith*, 2 *ib.* 457; *In bonis Patchell*, 3 *ib.* 153; *In bonis Hartley*, 50 L. J. P. 1; *In bonis Hodgkinson*, 69 L. T. 150.

Several testamentary instruments.

The fact that both instruments appoint a person sole executor will not cause the later instrument to revoke the former. *In bonis Leese*, 2 Sw. & T. 442; *In bonis Graham*, 3 *ib.* 69; *Geaves v. Price*, 3 *ib.* 71.

Where a subsequent will disposes or shows an intention of disposing of all the testator's property, it will be held to have revoked a prior will *in toto*, whether the dispositions contained in the subsequent will are different from the earlier dispositions or not. *Henfrey v. Henfrey*, 2 Curt. 468; 4 Moo. P. C. 29; *Pepper v. Pepper*, 1 R. 5 Eq. 85; *Plenty v. West*, 2 Phillim. 264; *Cottrell v. Cottrell*, 2 P. & D. 397; *Dempsey v. Lawson*, 2 P. D. 98; *O'Leary v. Douglass*, 3 L. R. Ir. 323; *In re M'Farlane*, 13 L. R. Ir. 264; *In bonis Turnour*, 56 L. T. 671; *In bonis Palmer*; *Palmer v. Peat*, 58 L. J. P. 44; *Cadell v. Wilcocks*, (1898) P. 21.

Inconsistent instruments.

This doctrine applies even though the second will cannot

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*McAra v. McCay*, 23 L. R. Ir. 188

Where there are two testamentary instruments, and from their nature and the surrounding circumstances it is doubtful whether the later was intended to be in substitution for the earlier one, evidence is admissible to show the intention; and the Court may infer from the similarity between two testamentary instruments that the later was intended to be substituted for the earlier. *Jenner v. Finch*, 5 P. D. 106; *Wainewright v. Wainewright*, 71 L. T. 265; *Chichester v. Quatrefages*, (1895) P. 186.

Last will. The description of a testamentary document as the last will of the testator will not alone have the effect of revoking prior testamentary papers. *Cutto v. Gilbert*, 9 Moo. P. C. 181; *Stoddart v. Grant*, 1 Macq. 171; *Lemage v. Goodban*, 1 P. & D. 57; *Leslie v. Leslie*, I. R. 6 Eq. 332; *Freeman v. Freeman*, Kay, 479; 5 D. M. & G. 704; *In bonis De la Saussaye*, 3 P. & D. 42; *In re O'Connor*, 13 L. R. Ir. 406.

Clause of revocation. A will containing a clause revoking all former wills revokes a will made in execution of a general or special power. *Sotheran v. Denning*, 20 Ch. D. 99; *Harvey v. Harvey*, 23 W. R. 476; *In re Kingdon*; *Wilkins v. Pryer*, 32 Ch. D. 604; *Cadell v. Wilcocks*, (1898) P. 21; see *In bonis Tenney*, 45 L. T. 78.

In several cases where a will was made in exercise of a power, a second will made in exercise of another power and containing a general clause of revocation, has been held not to revoke the first will, but these cases may be considered overruled. *In bonis Meredith*, 29 L. J. P. 155; *In bonis Merritt*, 1 Sw. & T. 112; 7 W. R. 543; *In bonis Joys*, 30 L. J. P. 169; 4 Sw. & T. 214.

A will under a power is revoked if a subsequent will contains an express reference to the power, or disposes of the property subject to the power, though it may not dispose of all of it. *Richardson v. Barry*, 3 Hag. 249; *In bonis Eustace*, 3 P. & D. 183; *Harvey v. Harvey*, 23 W. R. 478.

And a testamentary appointment under a general power is revoked by a subsequent will containing a residuary bequest. *In re Gibbes' Settlement*; *White v. Randolph*, 37 Ch. D. 143.



A will making an appointment under a special power is not revoked by a subsequent will, which contains no clause of revocation and does not exercise the power. *Cadell v. Wilcocks*, (1898) P. 21. Chap. VI.

A codicil reviving a revoked will thereby revokes a will intermediate in date between the first revoked will and the codicil, and inconsistent with the first will. *Lord Walpole v. Orford*, 3 Ves. 402; *In bonis Reynolds*, 3 P. & D. 85. Codicil  
reviving  
revoked will.

Where will A is revoked by will B and destroyed, and there is a codicil, purporting to revive will A but ineffectual to do so, because will A is not in existence, the question arises, whether will B is revoked. Codicil  
reviving  
destroyed will.

The cases on this subject are complicated. The rule appears to be, that if there are no dispositions in the codicil inconsistent with will B, the mere fact, that the codicil is described as a codicil to will A, does not revoke will B. *Rogers v. Goodenough*, 2 Sw. & T. 342.

On the other hand, if the codicil contains dispositions inconsistent with will B, or expressly confirms will A, it seems will B is revoked, and the codicil alone is admissible to probate. *Hale v. Tokelove*, 2 Rob. 318; *Newton v. Newton*, 12 Ir. Ch. 118.

The destruction or cancellation of a will, whereby it is revoked, will not revoke a codicil. *In bonis Dutton*, 3 Sw. & T. 66; *In bonis Ellice*, 12 W. R. 353; *In bonis Halliwell*, 4 N. of C. 400; *In bonis Coulthard*, 11 Jur. N. S. 184; *Tagart v. Hooper*, 1 Curt. 289; *Black v. Jobling*, 1 P. & D. 685; *In bonis Sarage*, 2 ib. 78; *In bonis Turner*, ib. 403; *Gardiner v. Courthope*, 12 P. D. 14; *In bonis Clements*, (1892) P. 254; *Paige v. Brooks*, 75 L. T. 455; see *Falle v. Godfrey*, 14 A. C. 70. Revocation of  
codicil.

But if will and codicil are on the same piece of paper, cutting off the signature to the will will revoke the codicil, if the intention was to revoke both. *In bonis Bleckley*, 8 P. D. 169.

Where a will is revoked by a subsequent codicil, it would be a question of construction, whether intermediate codicils are also revoked. Effect of  
codicil re-  
voking will  
on earlier  
codicils.

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If the revoking codicil refers to the will by date, or distinguishes between the will and subsequent codicils, the latter are not revoked. *Farrer v. St. Catharine's Coll.*, 16 Eq. 19; see *Bunny v. Bunny*, 3 B. 109; *Pratt v. Pratt*, 14 Sim. 129.

Re-execution  
of will con-  
taining clause  
of revocation.

The re-execution of a will, containing a clause revoking all former testamentary instruments, will not revoke a codicil to the will, at any rate if the object of the re-execution appears to have been to give effect to alterations in the will, or if there is evidence to show that revocation of the codicil was not intended. *Wade v. Nazer*, 1 Rob. 627; *Upfill v. Marshall*, 3 Curt. 636; *In bonis Rawlins*, 48 L. J. P. 64; 28 W. R. 139.

Codicil con-  
firming will.

A codicil making an alteration in a will, referred to as a will of a particular date, and confirming that will, does not, without other circumstances, revoke intermediate codicils. *Smith v. Cunningham*, 1 Add. 448; *Crosbie v. Macdoul*, 4 Ves. 610; *In bonis De la Saussaye*, 3 P. & D. 42; *Green v. Tribe*, 9 Ch. D. 281.

But an intermediate codicil may in effect be revoked if the second codicil shows an intention to confirm the will without the alteration made by the intermediate codicil. *McLeod v. McNab*, (1891) A. C. 471, P. C.

A codicil confirming the will except as altered by an earlier codicil referred to by its date does not revoke an intermediate codicil by which alterations have been made in the will. *Follett v. Pettman*, 23 Ch. D. 387.

Revocation of  
revoking  
codicil.

Where a codicil revoking a will in part, is itself revoked, the will remains as altered by the codicil. *In bonis Debac*, 77 L. T. 374.

Testamentary  
letter.

A letter, duly signed and attested, requesting a third person to destroy the testator's will, is sufficient to revoke it. *In bonis Durance*, 2 P. & D. 406.

Revocation by  
succession of  
acts.

Where a testator intends to revoke his will by the performance of a succession of acts, some only of which he actually performs, the will is not revoked, though the acts performed might alone be sufficient to revoke it if the testator intended to do no more. *Doe v. Perkes*, 3 B. & A. 489; *In bonis Colberg*, 2 Curt. 892; *Elms v. Elms*, 1 Sw. & T. 155. See, too, *Winson v. Pratt*, 2 B. & B. 650; *Locke v. James*, 11

M. & W. 901; *Kirke v. Kirke*, 4 Russ. 485; *Doe v. Harris*, 6 A. & E. 209; 2 N. & P. 615. Chap. VI.

But though a testator may have done everything which he considered necessary to revoke his will, the will is not revoked if he has not adopted one or other of the modes of revocation pointed out in sect. 20. (See *ante*, p. 38.) Acts done must be those named in statute.

Thus, writing across a will that it is revoked, and throwing it into the waste paper basket, will not revoke the will if it is in fact preserved. *Cheese v. Lovejoy*, 2 P. D. 251. See *Andrew v. Motley*, 12 C. B. N. S. 514.

The revocatory acts, if done by a third person by the testator's direction, must also be done in his presence. Revocation by third person.

Thus, a will burnt by the testator's order but not in his presence, is not revoked. *In bonis Dadds*, Dea. & Sw. 290; *Clark v. Dixon*, 8 Times L. R. 11.

Striking through the will or the signature of the testator with a pen, or partial erasure of the signature by a knife, is not sufficient to revoke his will. *Stephens v. Taprell*, 2 Curt. 458; *In bonis Rose*, 4 N. of C. 101; *Benson v. Benson*, 2 P. & D. 172; *Re Brewster*, 6 Jur. N. S. 56; *In bonis Godfrey*, 69 L. T. 22. Striking through signature.

A will found in the possession of the testator with the signature cut off or scratched away will, in the absence of evidence to the contrary, be presumed to be revoked. *In bonis Lewis*, 1 Sw. & T. 31; *Walker v. Armstrong*, 21 B. 305; 4 W. R. 770; *In bonis Gullan*, 1 Sw. & T. 23; *Hobbs v. Knight*, 4 Curt. 768; *Bell v. Fothergill*, 2 P. & D. 148; *In bonis Morton*, 12 P. D. 141. Tearing off signature.

And this is the case, though the piece cut off may be carefully preserved with the will. *In bonis Simpson*, 5 Jur. N. S. 1866; *In re White*, 3 L. R. Ir. 418; *Bell v. Fothergill*, 2 P. & D. 148; *Magnesi v. Hazelton*, 44 L. T. 586.

Obliterating or tearing off the names of the attesting witnesses is sufficient to revoke the will. *In bonis James*, 7 Jur. N. S. 52; *Abraham v. Joseph*, 5 Jur. N. S. 179; *Evans v. Dallow*, 31 L. J. P. 128. Tearing off names of witnesses.

Tearing off the name of one of the attesting witnesses would, no doubt, be sufficient to revoke the will. But the will is not

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revoked, if the name is carefully preserved with the will, and there is other evidence from the mode in which the piece cut off has been treated to rebut the presumption of revocation. *In bonis Wheeler*, 41 L. J. P. 29; *In bonis Taylor*, 63 L. T. 230.

Tearing off signatures recited to have been made.

The destruction of signatures not necessary to the validity of the will, but recited in the attestation clause to have been made, is sufficient to revoke the will. *Price v. Price*, 3 H. & N. 341; *Lumbell v. Lumbell*, 3 Hag. 568; *Darics v. Darics*, 1 Ca. t. Lee, 444; *Williams v. Tyley*, Johns. 530; *In bonis Harris*, 3 Sw. & T. 485.

Destruction of portion of will.

Where a portion of the will not necessary to its validity as a testamentary instrument is destroyed, the question is whether the portion destroyed is so important as to raise the presumption that the rest cannot have been intended to stand without it, or whether it is unimportant and independent of the rest of the will. *Clarke v. Scripps*, 2 Rob. 563; *In re White*, 3 L. R. Ir. 413.

Thus, the destruction of a clause at the commencement of a will, or cutting out various legacies, or a clause appointing executors, will not revoke the rest. *In bonis Woodward*, 2 P. & D. 206; *In bonis Nelson*, 1 R. 6 Eq. 569; *In bonis Maley*, 12 P. D. 134; *In bonis Leach*, 63 L. T. 111.

On the other hand, where the middle pages only of a will were preserved, the whole was held to be revoked, though each page had been signed and attested. *In bonis Gullan*, 1 Sw. & T. 23; *Gullan v. Grove*, 26 B. 64; where the facts are badly stated. See *Treloar v. Lean*, 14 P. D. 49.

A gift by deed of property disposed of by a prior will is not a revocation of the will, though it may make the will ineffectual. *Ford v. De Pontes*, 30 B. 572.

Will in duplicate.

Where a will is executed in duplicate, and the testator retains one while he deposits the other in the custody of another person, the destruction of the duplicate in the testator's possession revokes the whole. *Seymour's Case*, Com. Rep. 453; 1 P. W. 346; 2 Vern. 742; *Onions v. Tyrer*, 1 P. W. 346; *Burtenshaw v. Gilbert*, Cowp. 49; *Boughey v. Moreton*, 2 Cas. t. Lee, 532; 3 Hag. 191; *Richards v. Mumford*, 2 Phillim.

23; *Colvin v. Fraser*, 2 Hag. 266; see *Payne v. Trappes*, 1 Rob. 588. Chap. VI.

The same result follows if the duplicate in the testator's possession cannot be found at his death. *Jones v. Harding*, 58 L. T. 60.

A will or codicil left in the testator's possession and not forthcoming at his death must, in the absence of evidence to the contrary, be presumed to have been revoked. *Padmore v. Whatton*, 3 Sw. & T. 449; *In bonis Shaw*, 1 Sw. & T. 62; *Brown v. Brown*, 8 E. & B. 876; *Eckersley v. Platt*, 1 P. & D. 281; *Sugden v. Lord St. Leonards*, 1 P. D. 154; *In bonis Debac*, 77 L. T. 374. Will not found.

But the contents of the will and the declarations of the testator down to his death are admissible in evidence for the purposes of rebutting this presumption. *Patten v. Poulten*, 6 W. R. 458; 1 Sw. & T. 55; *Battyl v. Lyles*, 4 Jur. N. S. 718; *Finch v. Finch*, 1 P. & D. 371; *Whiteley v. King*, 17 C. B. N. S. 756; *Keen v. Keen*, 3 P. & D. 105; *Sugden v. Lord St. Leonards*, 1 P. D. 154.

Where a will, shown not to have been revoked, cannot be found at the testator's death, or has been lost or destroyed after his death but before probate, evidence is admissible to prove its contents. *Brown v. Brown*, 8 E. & B. 876; *In bonis Barber*, 1 P. & D. 267; *Burls v. Burls*, *ib.* 472; *In bonis Leigh*, (1892) P. 82. Evidence of contents of lost will.

And for this purpose the declarations, written or oral, of the testator, made before the execution of the will, may be admitted. *Doe d. Shalcross v. Palmer*, 16 Q. B. 747; *Quick v. Quick*, 3 Sw. & T. 442; *Johnson v. Lyford*, 1 P. & D. 546; *Sugden v. Lord St. Leonards*, 1 P. D. 154.

Declarations made by the testator after the execution of the will were also held admissible in *Sugden v. Lord St. Leonards*, but there is grave doubt whether the decision was right in that respect. See *Woodward v. Goulstone*, 11 App. C. 469; *Atkins v. Morris*, (1897) P. 40.

The contents of the will may be established by the evidence of a single interested witness whose veracity and competency are unimpeached. *Sugden v. Lord St. Leonards*, 1 P. D. 154; see *Flood v. Russell*, 29 L. R. Ir. 91.

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Where it is impossible to ascertain the whole contents of the will, effect will be given to such portions as can be ascertained, if the Court is satisfied that they substantially represent the intention of the testator. *Sugden v. Lord St. Leonards*, 1 P. D. 154; *Dickinson v. Stidolph*, 11 C. B. N. S. 841; *Woodward v. Goulstone*, 11 App. C. 469.

## CHAPTER VII.

### WILLS OF SOLDIERS AND SEAMEN.

THE Statute of Frauds (29 Car. II. c. 3), sect. 23, provides that, notwithstanding that Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages, and personal estate as he or they might have done before the making of the Act.

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Soldiers and sailors excepted from Statute of Frauds as regards wills of movables.

The Wills Act (1 Vict. c. 26), sect. 11, enacts that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of the Act.

Exception continued by Wills Act.

By the Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72), as amended by the Navy and Marines (Wills) Act, 1897 (60 & 61 Vict. c. 15), as to persons dying after June 3, 1897, it is provided :—

The Navy and Marines (Wills) Act, 1865.

#### 2. In this Act—

The term “seaman or marine” means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of Her Majesty’s vessels, or otherwise belonging to Her Majesty’s naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen.

Interpretation of terms.

3. A will made after the commencement of this Act by any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty.

Will made before entry ineffectual as to wages, &c.

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Will invalid  
if combined  
with power of  
attorney.

Regulations  
for wills of  
seamen, &c.,  
as to wages,  
&c.

4. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney.

5. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions :—

- (1.) Every such will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea :
- (2.) Where the will is made on board one of Her Majesty's ships, one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to Her Majesty's naval or marine or military force :
- (3.) Where the will is made elsewhere than on board one of Her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public, or a solicitor, or in Scotland a law agent.

A will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England ; and the person taking out representation to the testator under such will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects.



6. Notwithstanding anything in this or any other Act, a will made after the commencement of this Act by a seaman or marine while he is a prisoner of war, shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions :—

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As to wills made by prisoners of war.

- (1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to Her Majesty's naval or marine or military force, or a warrant or subordinate officer of Her Majesty's navy, or the agent of a naval hospital, or a notary public :
- (2.) If the will is made according to the forms required by the law of the place where it is made :
- (3.) If the will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea.

7. Notwithstanding anything in this Act, in case of a will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such will, though not made in conformity with the provisions of this Act, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with.

Payment under will not in conformity with Act.

By sect. 8, the Act was to commence in effect on the 1st January, 1866, with power for Her Majesty in Council, with reference to places out of the United Kingdom, to direct that the Act shall not commence until a time after that day.

Commencement of Act.

It follows, therefore, that except in the cases mentioned in the Navy and Marines (Wills) Act, 1865, any soldier in actual

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It is not proposed here to go into a full discussion of the old law. It may, however, be useful shortly to state some of the more important points relating to the wills of these privileged persons.

**Infancy.** Such privileged persons may make wills disposing of their personal property, provided they have attained the age of fourteen. *In bonis Farquhar*, 4 N. of C. 651; *In bonis McMurdo*, 1 P. & D. 540; Swinburne, part ii., sect. 2, p. 75.

**Soldier defined.** The term "soldier" in sect. 11 of the Wills Act includes an officer and a surgeon. *Drummond v. Parish*, 3 Curt. 522; *In bonis Hayes*, 2 Curt. 338; *In bonis Donaldson*, 2 Curt. 386.

**Military service.** The words "on actual military service" are equivalent to "on an expedition."

Thus a will made by an officer while quartered at home or abroad in barracks is not within this section. *Drummond v. Parish*, 3 Curt. 522; *White v. Repton*, 3 *ib.* 818; *In bonis Phipps*, 2 *ib.* 368; *In bonis Johnson*, *ib.* 341; *In bonis Hill*, 1 Rob. 276; *Herbert v. Herbert*, D. & Sw. 10; see *In bonis Donaldson*, 2 Curt. 386.

**Mariner defined.** The term "mariner or seaman" includes a purser and a surgeon, and it seems the whole profession. *In bonis Hayes*, 2 Curt. 338; *In bonis Saunders*, 1 P. & D. 16; *In bonis Rae*, 27 L. R. Ir. 116.

It also includes persons serving in the merchant service. *In bonis Milligan*, 2 Rob. 108; *Morrell v. Morrell*, 1 Hag. 51; *In bonis Parker*, 2 Sw. & T. 375.

**"At sea."** The term "at sea" appears to be equivalent to "on maritime service," including the period while the testator is returning from such service. Thus wills made on board a vessel in a river, or in port, have been held valid within sect. 11. *In bonis Austen*, 2 Rob. 611; *In bonis Corby*, 18 Jur. 684; *In bonis Lay*, 2 Curt. 375; *Seymour's Case*, cit. 3 Curt. 530; *In bonis Saunders*, 1 P. & D. 16; *In bonis McMurdo*, *ib.* 540; *In bonis Rae*, 17 L. R. Ir. 116; *In bonis Patterson*, 79 L. T. 123.

The privileged persons above mentioned may make nuncupative wills, which will remain operative, though at the time of their death they may not be on service, or at sea. *Morrell v. Morrell*, 1 Hag. 51; *In bonis Leese*, 17 Jur. 216; see, too, *Leman v. Bonsall*, 1 Add. 989.

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Nuncupative wills.

They may make a will by any testamentary paper, whether in their handwriting or not, and whether signed by them or not, provided it can be shown that such paper was intended to take effect as the testator's last will. *Friswell v. Moore*, 3 Phillim. 185; *Constable v. Steibel*, 1 Hag. 56; *MacLae v. Ewing*, 1 Hag. 317; *Read v. Phillips*, 2 Phillim. 122; *Masterman v. Maberly*, 2 Hag. 235. See *Rymer v. Clarkson*, 1 Phillim. 22; *In bonis Cosser*, 1 Rob. 693; *Fulleck v. Atkinson*, 3 Hag. 527; *Wood v. Medley*, 1 Hag. 661; *In bonis Rac*, 27 L. R. Ir. 116.

The following rules must be understood as relating only to wills of personalty not within the Statute of Frauds or the Wills Act.

A will not found in the testator's possession cannot be established merely on proof of the testator's handwriting. *Machin v. Grindell*, 2 Lee, 406; *Jameson v. Cooke*, 1 Hag. 82; *Crisp v. Walpole*, 2 Hag. 541; *Rutherford v. Maule*, 4 Hag. 213; *Bussell v. Marriott*, 1 Curt. 9; *Wood v. Goodlake*, 2 Curt. 82, 176; 2 Moo. P. C. 354, 436.

Proof of handwriting.

A will bearing an execution or attestation clause, but unexecuted or unattested, will be presumed not to have been finally adopted as the will of the testator. *Scott v. Rhodes*, 1 Phillim. 19; *Abbott v. Peters*, 4 Hag. 380; *Beaty v. Beaty*, 1 Add. 154; *Montefiore v. Montefiore*, 2 Add. 357; *Stewart v. Stewart*, 2 Moo. P. C. 193; *Bragg v. Dyer*, 3 Hag. 207.

Will with attestation clause, but not attested.

Such presumption may be rebutted, if sufficient grounds can be shown for the omission to execute or attest it, such as ill-health or unavoidable accident, or if it appears that it was intended to take effect as the testator's will in the form in which it is found. *In bonis Taylor*, 1 Hag. 641; *L'Huile v. Wood*, 2 Cas. t. Lee, 22; *Lamkin v. Babb*, 1 Cas. t. Lee. 1; *Scott v. Rhodes*, 1 Phillim. 12; *Masterman v. Maberly*, 2 Hag. 247; *Hoby v. Hoby*, 1 Hag. 146; *Forbes v. Gordon*, 3 Phillim.

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614; *Thomas v. Wall*, 3 Phillim. 23; *In bonis Lamb*, 4 N. of C. 561; *Buckle v. Buckle*, 3 Phillim. 323; *Allen v. Manning*, 2 Add. 490; *Harris v. Bedford*, 2 Phillim. 177.

Will including  
realty.

Where the will includes property which can only be given by a will executed with certain formalities, the same presumption arises that the will was intended to be executed with such formalities. *In bonis Herne*, 1 Hag. 222, 226; *Douglas v. Smith*, 3 Knapp, 1; *Elsden v. Elsdon*, 4 Hag. 183; *Gillox v. Burne*, 4 Hag. 291; *Reynolds v. White*, 2 Lee, 214; *Reeves v. Glover*, 2 Lee, 359.

It seems if the will includes realty, and the gift of the personalty is made dependent on the gift of the realty, probate of the will as regards the personalty would be refused as well. *Tudor v. Tudor*, 4 Hag. 199, n.

Temporary  
will.

A paper intended to be effectual, pending the preparation of a more formal document, will take effect as a will, if no formal document is executed. *Popple v. Cunison*, 1 Add. 377; *Forbes v. Gordon*, 3 Phillim. 614; *Hattatt v. Hattatt*, 4 Hag. 211.

Instructions  
for will

Instructions for a will may take effect as a will, if the testator was prevented by death from executing a formal will. *Bone v. Spear*, 1 Phillim. 345; *Green v. Skipworth*, *ib.* 53; *Wood v. Wood*, *ib.* 357; *Huntington v. Huntington*, 2 *ib.* 218; *Sikes v. Snaith*, *ib.* 351; *Must v. Sutcliffe*, 3 *ib.* 104; *Nathan v. Morse*, *ib.* 529; *Lewis v. Lewis*, *ib.* 109; *Allen v. Manning*, 2 Add. 490; *Goodman v. Goodman*, 2 Lee, 109; *Robinson v. Chamberlayne*, *ib.* 129; *Brown v. Farrant*, *ib.* 418; *Burrows v. Burrows*, 1 Hag. 109.

Where an interval intervenes between the preparation of instructions for a will and the death of the testator, the instructions will take effect as a will only upon evidence that the testator adhered to them down to his death. *Bone v. Spear*, 1 Phillim. 345; *Devereux v. Bullock*, *ib.* 60, 72; *Sandford v. Vaughan*, *ib.* 48; *In bonis Herne*, 1 Hag. 222; *Barwick v. Mullings*, 2 Hag. 225; *Mitchell v. Mitchell*, *ib.* 74; *Dingle v. Dingle*, 4 *ib.* 388; *Reay v. Cowcher*, 2 *ib.* 249; *Antrobus v. Nepean*, 1 Add. 399; *Munro v. Coutts*, 1 Dow, 437; *Matthews v. Warner*, 4 Ves. 186; *Torre v. Castle*, 2 Moo. P. C. 133.

An unexecuted paper, containing only a partial disposition of the testator's property, will not take effect as a will, unless it be shown to contain the final intention of the testator as far as it goes. *Montefiore v. Montefiore*, 2 Add. 354; *Cundy v. Medley*, 1 Hag. 140; *MacLae v. Ewing*, *ib.* 317; *In bonis Wenlock*, *ib.* 551; *In bonis Robinson*, *ib.* 643; *Devereux v. Bullock*, 1 Phillim. 60; *Sandford v. Vaughan*, *ib.* 48; *Theakston v. Marson*, 4 Hag. 290; *Bayle v. Mayne*, 3 Phillim. 504. Chap. VII.  
Partial disposition.

Alterations in the will of a soldier, which was made while on actual military service, will be presumed to have been made during the continuance of such service. *In bonis Tweedale*, 3 P. & D. 204. Alterations.

A charge of legacies on real estate contained in a will duly executed to affect realty will include legacies given by a subsequent unattested will when the testator is one of the persons competent to dispose of his personalty by such will. *Buckeridge v. Ingram*, 2 Ves. Jun. 652; *Sheddon v. Godrich*, 8 Ves. 481; *Wilkinson v. Adam*, 1 V. & B. 445; *Swift v. Nash*, 2 Kee. 20; see *Rose v. Cunynghame*, 12 Ves. 29. Charge of legacies on realty.

Legacies charged upon real estate as an auxiliary fund may be revoked by a subsequent valid will, though not executed so as to affect realty. *Brudenell v. Boughton*, 2 Atk. 268; *A.-G. v. Ward*, 3 Ves. 327.

Legacies charged only upon real estate cannot be revoked by a subsequent valid will not executed so as to affect realty. *Beckett v. Harden*, 4 Mau. & S. 1; *Locke v. James*, 11 M. & W. 901; see *Mortimer v. West*, 2 Sim. 274; *Fitzgerald v. Field*, 1 Russ. 428.

Legacies given out of a mixed fund of realty and personalty can be revoked by a valid will not executed to affect realty only so far as they are payable out of the personalty. *Stocker v. Harbin*, 3 B. 479.

A valid will of personalty not executed to affect realty may dispose of any portion of the personalty free from legacies, though the effect may be to increase a charge of legacies on realty contained in a prior will effectually disposing of real estate. *Core v. Bassett*, 3 Ves. 155.

The marriage of a privileged testator or the birth of a child Revocation by marriage

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and birth of  
children.

subsequent to the date of the will will not alone revoke the will. *Doe v. Barford*, 4 M. & S. 10; *Wellington v. Wellington*, 4 Burr. 2171; *Wells v. Wilson*, 5 T. R. 52, n.; *Jackson v. Hurlock*, Amb. 495.

But the birth of children alone after the date of the will affords a presumption against the will. *Johnston v. Johnston*, 1 Phillim. 447.

A privileged will is revoked by the subsequent marriage of the testator and the birth of children, unless the wife and children are provided for by the will or by a previous settlement. *Overbury v. Overbury*, 2 Stow. 242; see 1 Phillim. 479; *Kenebel v. Scrafton*, 2 East, 530; *Doe v. Lancashire*, 5 T. R. 49 (posthumous child).

Marriage of  
widower.

The same rule applies to the case of a widower who marries a second time and has children, though the will may be in favour of children by the first marriage. *Christopher v. Christopher*, Dick. 445; *Holloway v. Clarke*, 1 Phillim. 339; *Walker v. Walker*, 2 Curt. 854.

It appears to be unsettled whether the birth of children by a first wife after the date of the will and marriage to a second wife revokes the will. *Gibbons v. Caunt*, 4 Ves. 848.

The will is not revoked where it does not dispose of all the testator's estate. See *Kenebel v. Scrafton*, 2 East, 541; *Marston v. Roe d. Fox*, 8 Ad. & E. 57; *Brady v. Cubitt*, Dougl. 40; *Doe d. Shelley v. Edlin*, 4 A. & E. 582.

Provision for  
wife.

Provision made for the wife alone by a settlement or by the will itself will not prevent its revocation. *Marston v. Roe d. Fox*, 8 A. & E. 14; 2 Nev. & P. 504.

Provision by a settlement subsequent to the will will not prevent revocation. *Israell v. Rodon*, 2 Moo. P. C. 51; see *Talbot v. Talbot*, 1 Hag. 705; *Ex parte Ilchester*, 7 Ves. 348; *Johnston v. Wells*, 2 Hag. 561; *In bonis Cadywold*, 1 Sw. & T. 34.

The will is not revoked where such revocation would not benefit the afterborn children. *Sheath v. York*, 1 V. & B. 390.

The fact that the wife and children predecease the testator will not revive the revoked will. *Helyar v. Helyar*, 1 Phillim. 413; *Sullivan v. Sullivan*, *ib.* 343; *Emerson v. Borille*, *ib.*

342 ; overruling *Wright v. Netherwood*, 2 Salk. 539, n. ; 2 **Chap. VII.**  
*Phillim.* 266, n.

In the case of privileged wills it seems clear that a will, though revoked by marriage and birth of children, may be set up again by evidence of intention to adhere to it, such wills being free from the operation of the Statute of Frauds and Wills Act. See *Marston v. Roe d. Fox*, 8 A. & E. 14 ; *Gibbens v. Cross*, 2 Add. 455 ; *Fox v. Marston*, 1 Curt. 494 ; *Israell v. Rodon*, 2 Moo. P. C. 51 ; *Matson v. Magrath*, 1 Rob. 680 ; *Tapster v. Holtzapffel*, 5 N. of C. 554.

## CHAPTER VIII.

REVIVAL—REPUBLICATION—INCORPORATION—  
SECRET TRUSTS.A. *Revival of Wills.***Chap. VIII.**

No will re-  
voked to be  
revived other-  
wise than by  
re-execution,  
or a codicil  
to revive it.

THE Wills Act (1 Vict. c. 26), sect. 22, enacts, that no will or codicil, or any part thereof which shall be in any manner revoked, shall be revived, otherwise than by the re-execution thereof, or by a codicil executed in manner thereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Revocation  
of revoking  
will.

Where a testamentary disposition is revoked by a subsequent disposition, which latter is in its turn revoked, the former disposition is not thereby revived. *Burtenshaw v. Gilbert*, Cowp. 49; *In bonis Brown*, 1 Sw. & T. 32; *Brown v. Brown*, 8 E. & B. 876; *Wood v. Wood*, 1 P. & D. 309; see *M'Ara v. M'Cay*, 23 L. R. Ir. 138.

Where the testator by his will gave all his property to A and by a second will gave his real estate to B and then revoked the second will, it was held that the first will took effect only on the personalty. *In bonis Hodgkinson*, (1893) P. 339.

Revival by  
codicil.

It has been doubted whether since the Wills Act a codicil, described as a codicil to a will of a particular date which has been revoked, would be sufficient to revive the revoked will in



the absence of any additional evidence of "intention to revive the same." *In bonis Steele*, 1 P. & D. 575; see *In bonis Lindsay*, 8 Times L. R. 507. Chap. VIII.

There is an obvious distinction between a codicil incorporating and giving effect to earlier unattested instruments, for which purpose a mere reference is sufficient, and a codicil reviving a revoked instrument.

There are, however, cases in which a codicil described as a codicil to a particular will which has been revoked by marriage, there being no other will in existence, has been held sufficient to revive the revoked will. *In bonis Chapman*, 1 Rob. 1; *Payne v. Trappes*, 1 Rob. 588.

This was clearly the rule before the Wills Act. *Lord Walpole v. Earl of Orford*, 3 Ves. 402; *S. C.* 7 T. R. 138.

In the case of *Neate v. Pickard*, 2 N. of C. 406, and in *In bonis Reynolds*, 3 P. & D. 35, there appear to have been express words of confirmation; see, too, *McLeod v. McNab*, (1891) A. C. 471, P. C.

It seems a codicil, described as a codicil to a will of a particular date, though the codicil is directed to take effect only in events which do not happen, may have the effect of reviving the will. *In bonis Da Silva*, 2 Sw. & T. 315; see *Parsons v. Lanoe*, 1 Ves. Sen. 190. Contingent codicil.

If there are two wills, the later of which revokes the earlier, it seems a codicil described as a codicil to the testator's last will, but giving the date of the revoked will, will not revive that will or revoke the second will. *In bonis May*, 1 P. & D. 581; *In bonis Ince*, 2 P. D. 111. These cases may very well be supported on the ground that the description of the will by the codicil was ambiguous, the will of the date mentioned not being the last will of the testator, or, in fact, his will at all, as it had been revoked. See *In bonis Edge*, 9 L. R. Ir. 516. Codicil referring to will revoked by later will.

In *In bonis Anderson*, 39 L. J. P. 55, the principle applied was the same. In that case the codicil was expressed to be a codicil to the testator's last will, but confirmed a will by date which had been revoked.

In *In bonis Wilson*, 1 P. & D. 582, the codicil, though referring to a revoked will by date, went on to refer to certain

**Chap. VIII.** bequests as contained in that will, which were, in fact, contained in a later will. There was, therefore, a clear case of mistaken description.

If the codicil not only refers to the revoked will by date but also refers to the provisions of the revoked will, probate will be granted of the revoked will, the subsequent will and the codicil together. *In bonis Stedham*; *In bonis Dyke*, 6 P. D. 205; *In bonis Chilcott*, (1897) P. 228.

Where a will was revoked by a subsequent will, a codicil described as a codicil to the testator's last will, and confirming certain dispositions contained in the revoked will, had the effect of reviving the revoked will. *In bonis Van Cutsem*, 68 L. T. 252.

Where a codicil merely refers by recital to a revoked will, the revoked will is not revived. *In bonis Dennis*, (1891) P. 326.

Writing on  
the will  
referring to  
its contents.

A testamentary disposition, written at the foot of a will revoked by marriage, and referring to a bequest contained in the will, though not referring to the will in terms or described as a codicil, is sufficient to revive the will. *In bonis Terrible*, 2 Sw. & T. 8.

Codicil  
attached to  
revoked will.

The fact that a codicil is found attached by tape to a will which has been revoked by a later will will not revive the revoked will. *Marsh v. Marsh*, 1 Sw. & T. 528.

Destroyed  
will.

A will which has been destroyed and no longer exists in writing cannot be revived by a codicil, though there may be a draft of the will in existence. *Hale v. Tokelore*, 2 Rob. 318; *Newton v. Newton*, 12 Ir. Ch. 118; *Rogers v. Goodenough*, 2 Sw. & T. 342.

Codicil con-  
firming will  
altered by  
earlier codicil.

A codicil which refers to a will by date and makes certain alterations in it and then confirms the will, does not revive so much of the will as has been altered by intermediate codicils. *Crosbie v. MacDoual*, 4 Ves. 610; *Green v. Tribe*, 9 Ch. D. 231.

But a second codicil confirming the will and reciting and treating as unrevoked certain dispositions of the will which have in fact been revoked by a first codicil, revives the will without the alterations made by the first codicil. *McLeod v. McNab*, (1891) A. C. 471, P. C.

Where a testator had by a third codicil revoked the first and second codicils, and by a fourth codicil confirmed his will and former codicils, it was held that, as the fourth codicil confirmed the third, the first and second remained revoked. *In bonis Carritt*, 66 L. T. 379.

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### B. Republication.

A distinction must be made between revival of a revoked testamentary instrument and republication of a valid testamentary instrument in such a way as to make it operate as at the date of republication.

Republication of earlier testamentary instrument.

It is clear that any reference which would be sufficient to revive a revoked instrument would be sufficient to republish an earlier unrevoked instrument. But a reference, sufficient to republish, would not necessarily revive a revoked instrument.

Thus a codicil described as a codicil to a will republishes the will though it may not be sufficient to revive the will if revoked. *Acherley v. Vernon*, 3 B. P. C. 107; *Barnes v. Crowe*, 1 Ves. Jun. 486; *Skinner v. Ogle*, 5 N. of C. 74; 1 Rob. 363; *Rowley v. Eyton*, 2 Mer. 128, as corrected in 45 Ch. D. 637.

Again, a testamentary instrument not described as a codicil but written at the foot of the will and containing a reference to the executors named in the will republishes the will. *Serocold v. Heming*, 2 Lee Eccl. 490.

But a will is not republished by a testamentary instrument not described as a codicil and not containing any reference to the will. *In re Smith*; *Bilke v. Roper*, 45 Ch. D. 632.

A codicil referring to a will of a particular date does not republish an intermediate codicil. *Burton v. Newbery*, 1 Ch. D. 284.

### C. Incorporation of Documents.

Any document in existence when the will is executed, and sufficiently described to enable it to be identified, may be incorporated with the will, and may be referred to for purposes of construction, whether incorporated in the probate or not. *Hutchings v. Wood*, 2 Moo. P. C. 355; *Aaron v. Aaron*, 3

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De G. & S. 475 ; *In bonis Sunderland*, 1 P. & D. 198 ; *In bonis Mercer*, 2 P. & D. 91 ; *In bonis Daniell*, 8 P. D. 14 ; see *In bonis Pascall*, 1 P. & D. 606 ; *In bonis Gill*, 2 P. & D. 6 ; *Quihampton v. Going*, 24 W. R. 917 ; *In bonis Garnett*, (1894) P. 90.

Whether document must be described as existing.

It has been said that the document must not only be in fact in existence when the will is executed, but also that it must be described as existing. *Van Straubenzee v. Monk*, 3 Sw. & T. 6 ; *In bonis Watkins*, 1 P. & D. 19 ; *In bonis Dallow*, *ib.* 189 ; *In bonis Sunderland*, *ib.* 198 ; *In re Kehoe*, 18 L. R. Ir. 13.

It would seem, however, that if the document is proved to have been in existence at the date of the will, and is sufficiently identified by the description in the will, it is not necessary that it should be actually described as existing. See *Singleton v. Tomlinson*, 3 App. C. 404 ; *In re Coyte* ; *Coyte v. Coyte*, 56 L. T. 510.

Incorporation of documents in existence at date of codicil.

It seems that a document sufficiently referred to in the will, though not in existence, may be incorporated if it exists at the date of a codicil to the will. *In bonis Hunt*, 2 Rob. 622 ; *In bonis Stewart*, 32 L. J. P. 94 ; 3 Sw. & T. 192 ; 4 Sw. & T. 211 ; *In bonis Lady Truro*, 1 P. & D. 221, not following *In bonis Mathias*, 32 L. J. P. 115 ; 3 Sw. & T. 100.

But for this purpose it must be clear that the will, if read as of the date of the codicil, refers to a definite instrument, and that the instrument in question satisfies the description in the will. *Durham v. Northen*, (1895) P. 66.

Thus, a codicil confirming a will, which directs certain property to be distributed as the testator may by any memorandum or deed direct, will not have the effect of incorporating memoranda executed between the dates of the will and codicil. *In bonis Lancaster*, 29 L. J. P. 155 ; see *In bonis Warner*, 10 W. R. 566 ; *In bonis MacGregor*, 60 L. T. 840.

Memorandum on back of will.

A memorandum not described as a codicil written on the back or the fourth side of a paper containing an invalid will to which it does not refer does not incorporate the will. *In bonis Drummond*, 2 Sw. & T. 8 ; *In bonis Torey*, 47 L. J. P. 63 ; see *In bonis Willmott*, 1 Sw. & T. 36.

So a reference to executors "hereunder named," or the words "turn over," will not incorporate a clause not contained in the body of the will, though written before execution. *In bonis Dallow*, 1 P. & D. 189; *In bonis Dearle*, 39 L. T. 93. See *In bonis Watkins*, 1 P. & D. 19. Chap. VIII.

On the other hand, the words "see over," with an asterisk, have been held sufficient to incorporate a sentence on the second side of a sheet of paper, by the side of which was also written "see over," with an asterisk. *In bonis Birt*, 2 P. & D. 214. See *In bonis Greenwood*, (1892) P. 7.

The cases above cited on the subject of revival are also authorities on the subject of incorporation.

Thus it would seem that a memorandum at the foot of a will, referring to something contained in the will, would incorporate it, though there is no express reference to the will as such. *In bonis Terrible*, 2 Sw. & T. 8; *In bonis Widdrington*, 35 L. J. P. 66. See *Gardiner v. Courthope*, 12 P. D. 14. Memorandum referring to contents of will.

Upon similar principles it has been held that a testamentary disposition not described as a codicil, but written on the back of the will underneath two codicils described as codicils to the will, and altering a provision contained in the second codicil, had the effect of republishing the will and codicils. *Guest v. Willasey*, 2 Bing. 429; 3 Bing. 614.

A reference by a duly attested codicil to a will incorporates the will, if the reference is such as to show that the testator intended to incorporate it, and if there is only one document in existence to which the term "will" can apply. *Barnes v. Crowe*, 1 Ves. Jun. 485; *Doe d. Williams v. Evans*, 1 Cr. & Mee. 42; *Allen v. Maddock*, 11 Moo. P. C. 427; *In bonis Heathcote*, 6 P. D. 31. Reference to a will in a codicil incorporates an unattested will.

Similarly, a reference in a codicil to a prior unattested codicil will incorporate it. *Ingoldby v. Ingoldby*, 4 N. of C. 493; *Smith's Case*, 2 Curt. 796. Reference to unattested codicil.

A reference, however, in a codicil to a will and prior codicils, where there are a will and codicils duly attested, will not incorporate a codicil not duly attested. *Croker v. Marquis of Hertford*, 3 Curt. 468; 4 Moo. P. C. 339. Reference to will where there are a valid will and codicils.

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Reference to will where there are a valid will and unattested codicils.

And upon the same principle it would seem that a reference by a codicil to a will, where there are a duly attested will and some unattested codicils, will not set up the unattested codicils. *Utterton v. Robins*, 1 Ad. & E. 423; 2 Nev. & M. 821; *In bonis Phelps*, 6 N. of C. 695; *Haynes v. Hill*, 7 N. of C. 256; see, however, *Radburn v. Jervis*, 3 B. 450; *Guest v. Willasey*, 2 Bing. 429; 3 Bing. 614.

Will may include will and codicils.

Possibly a reference to a will in general terms would incorporate all the valid instruments constituting the will, such as a will and several codicils.

Reference to will by date.

A codicil referring to a will by date incorporates the will of that date only, and not subsequent codicils. *Burton v. Newbery*, 1 Ch. D. 234; *In bonis Reynolds*, 3 P. & D. 35; *French v. Hoey*, (1899) 2 Ir. 472.

The case is not altered by the fact that a valid codicil referring to the will by date is written on the same paper as a valid will and an intermediate unattested codicil. *In bonis Hutton*, 5 N. of C. 598; *In bonis Phelps*, 6 ib. 695; *In bonis Willmott*, 1 Sw. & T. 36; *In re Spotten*, 5 L. R. Ir. 408.

Perhaps where a codicil is directed to be taken as part of the will, a subsequent codicil referring to the will by date and confirming it will have the effect of confirming the codicil as well. See *Gordon v. Lord Reay*, 5 Sim. 274, disapproved, in *Burton v. Newbery*, *supra*.

If the codicil recites the will by date and a codicil by date, and then confirms the "said will," the term "will" may include both will and codicil. *Aaron v. Aaron*, 3 De G. & S. 475.

As to whether a codicil headed "This is a fourth codicil to my will" would incorporate a codicil headed "This is a third codicil to my will," see *Stockil v. Punshon*, 6 P. D. 9.

Effect of incorporation.

Incorporation of an instrument into a will does not alter the effect of the instrument so far as it is already valid. So far as it is invalid as an independent instrument it takes effect as a testamentary disposition, subject to the ordinary rules as to lapse, ademption, &c., applicable to wills. *Bizzey v. Flight*, 3 Ch. D. 269.

Paper not in existence

A paper not in existence at the date of the execution of a

testamentary instrument cannot be incorporated in it or referred to for purposes of construction. *Countess Ferraris v. Lord Hertford*, 3 Curt. 468; *In bonis Watkins*, 1 P. & D. 19; *In bonis Dallow*, *ib.* 189; *Singleton v. Tomlinson*, 3 App. C. 404; *Smith v. Conder*, 9 Ch. D. 170; see *In bonis Keller*, 61 L. J. P. 39; 65 L. T. 763.

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cannot be incorporated.

A testator<sup>f</sup> cannot reserve by his will the power of making a testamentary disposition of his property by a subsequent unattested paper. *Habergham v. Vincent*, 2 Ves. Jun. 204; 4 B. C. C. 353; *Countess De Zichy Ferraris v. Lord Hertford*, 3 Curt. 468; 4 Moo. P. C. 339.

Power cannot be reserved by will of making a subsequent unattested will.

Thus, a gift to trustees to hold upon the uses appointed by a letter to be signed by the testator is invalid. *Johnson v. Ball*, 5 De G. & S. 85.

But there is no objection to a gift to persons to be ascertained by a subsequent act on the part of the testator, provided the act is one which must be done as the natural result of the state of the property at the date of the will, and is in no way dependent upon a power reserved by the will. *Stubbs v. Sargon*, 2 Kee. 255; 3 M. & Cr. 507, where the gift was to the persons who should be in co-partnership with the testatrix at the time of her decease, or to whom she should have disposed of her business.

Persons to take under a particular description may depend on a subsequent act of the testator.

Where a gift is made by will to a person, and it appears on the face of the will that the gift is to be held on trust, but the trusts are not declared, oral evidence of the trusts is admissible if they have been communicated to the legatee prior to the execution of the will. *Crook v. Brooking*, 2 Vern. 50, 106; *Pring v. Pring*, 2 Vern. 98; *Irvine v. Sullivan*, 8 Eq. 673; *Riordan v. Banon*, 1 R. 10 Eq. 469; *In re Fleetwood*; *Sidgreaves v. Brewer*, 49 L. J. Ch. 514; 15 Ch. D. 594; see *Scott v. Brownrigg*, 9 L. R. Ir. 246; *In bonis Marchant*, (1893) P. 254, a curious case.

Gift on trusts declared by parol to the trustee.

It has been said that where the will discloses that a bequest is made to a person as a trustee, but the nature of the trusts is not disclosed, evidence of the trusts is admissible, if they have been communicated to the legatee after the execution of the will. See *Moss v. Cooper*, 1 J. & H. 352; *Riordan v. Banon*,

Gift on trust; trust disclosed later.

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I. R. 10 Eq. 469; *In re Fleetwood*; *Sidgreaves v. Brewer*, 49 L. J. Ch. 514; 15 Ch. D. 594, where *Johnson v. Ball*, 5 D. G. & S. 85, which is an authority to the contrary, is discussed.

But if the trusts are contained in a letter not incorporated with the will and not communicated to the trustees till after the testator's death, the trusts fail. *Scott v. Brownrigg*, 9 L. R. Ir. 246.

D. *Secret Trusts.*

The distinction between the class of cases where it appears on the face of the will that there is a trust and those mentioned below, where an absolute bequest is made upon a secret trust accepted by the legatee, though fine is real.

In the latter cases the legatee would be enabled to commit a fraud if evidence of the trust were not admitted. In the former cases he is a trustee upon the face of the will, and cannot therefore in any case take beneficially.

## Secret trust.

Where a gift is made in absolute terms, but the testator before or after the date of his will communicates to the legatees his intention that they are to hold the gift in trust, and they either accept the trust or acquiesce in it by silence, evidence of the trust is admissible. *Wallgrave v. Tebbis*, 2 K. & J. 313; *Moss v. Cooper*, 1 J. & H. 352; *Jones v. Badley*, 3 Ch. 362.

Such evidence is admissible, although the will states that the gift is not by way of trust. *Russell v. Jackson*, 10 Ha. 204; *Re Spencer's Will*, 57 L. T. 519; see *Pryor v. Pryor*, 2 D. J. & S. 205; *In re Crawshay*; *Crawshay v. Crawshay*, 43 Ch. D. 615.

The details of the trust must be disclosed to the trustees in the testator's lifetime, otherwise it cannot be enforced, and the devisee will take as trustee for the next of kin or heir. *In re Boyes*; *Boyes v. Carritt*, 26 Ch. D. 531.

Gift to  
A and B  
induced  
by promise  
of A.

If the testator is induced by A to make a gift to A and B, on the faith of A's promise that it shall be applied for certain purposes, the trust attaches to the gift to both, though B may have known nothing of the matter, the reason being that no man



can profit by the fraud of another; see *Russell v. Jackson*, 10 Ha. 204 (joint tenants), p. 212; *Moss v. Cooper*, 1 J. & H. 352 (tenants in common). In both these cases the legatees all knew of the testator's intentions before the will was made.

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It is said that a different rule applies if A and B are tenants in common and not joint tenants, and that in such a case B may take his moiety free from any trust; but there seems to be no express decision in support of the distinction; see *Roebotham v. Dunnett*, 8 Ch. D. 430; *In re Stead*; *Witham v. Andrew*, (1900) 1 Ch. 237; *Freeman v. Laing*, (1899) 2 Ch. 359. *Tee v. Ferris*, 2 K. & J. 357, was a case where the gift was not communicated until after it had been made; the gift itself was not induced by any promise.

Distinction as to tenants in common.

If a gift is made by will to A and B as tenants in common (a), or as joint tenants (b), and the testator afterwards communicates the gift to A, and leaves it unrevoked on the faith of a promise by A to apply the money to certain purposes, the trust attaches to A's moiety only, and not to B's. There is here no fraud inducing the original gift. *Tee v. Ferris*, 2 K. & J. 357 (a); *In re Stead*; *Witham v. Andrew*, (1900) 1 Ch. 237 (b); see also *Burney v. Macdonald*, 15 Sim. 6; *Roebotham v. Dunnett*, 8 Ch. D. 430.

Gift left unrevoked by subsequent promise.

In cases of secret trust the intention to create a trust must be clearly established. *Jones v. Badley*, 3 Ch. 362; *McCormick v. Grogan*, L. R. 4 H. L. 82; *Re Downing's Residuary Estate*, 60 L. T. 140.

## CHAPTER IX.

## PROBATE AND ITS EFFECT.

Chap. IX.	EVERY instrument containing a testamentary disposition or affecting a prior testamentary disposition of personal property, is entitled to probate if properly executed and attested. <i>In bonis Durance</i> , 2 P. & D. 406.
What may be proved.	
Instrument appointing executor.	A testamentary instrument appointing an executor is entitled to probate, though the executor renounces probate. <i>O'Dwyer v. Geare</i> , 1 Sw. & T. 465 ; 29 L. J. P. 47 ; <i>In bonis Lancaster</i> , 1 Sw. & T. 454 ; <i>In bonis Jordan</i> , 1 P. & D. 555.
Codicil.	A properly attested codicil is entitled to probate by itself, although it may by its language be dependent on an unattested will. <i>Gardiner v. Courthope</i> , 12 P. D. 14.
Contingent will.	A will to take effect upon a contingency is not admissible to probate for any purpose if the contingency does not happen, and is inoperative to revoke a previous will. <i>In bonis Hugo</i> , 2 P. D. 73.
Contingent codicil.	But the principle does not apply to a codicil which will be admitted to probate, even if it is conditional and contains a declaration that it is not to be proved unless the condition is fulfilled, as it may have the effect of republishing the will. <i>In bonis Da Silva</i> , 2 Sw. & T. 315 ; <i>In bonis Colley</i> , 3 L. R. Ir. 243.
Instrument appointing guardians.	An instrument appointing guardians merely is not entitled to probate. <i>In bonis Morton</i> , 33 L. J. P. 87.
Wills of married women.	Probate of the will of a married woman is now granted in the ordinary common form, whether she was married before or since the commencement of the Married Women's Property Act, 1882. See Probate Rules, March, 1887, cited <i>In re Lambert's</i>

*Estate ; Stanton v. Lambert*, 39 Ch. D. 626; *In re Jevers*, 13 L. R. Ir. 1; *In bonis Price*, 12 P. D. 137. Chap. IX.

The effect of such probate is to enable the executor to get in the assets, whether they pass under the will or not, but it does not affect the beneficial title. *In re Lambert's Estate ; Stanton v. Lambert*, 39 Ch. D. 626; *Smart v. Tranter*, 43 Ch. D. 587. Effect of probate.

By virtue of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), sect. 1 (which applies only in cases of death after the 1st January, 1898), real estate, including real estate appointed under a general power of appointment by will, devolves to the personal representatives of a deceased person as if it were a chattel real, and probate and letters of administration may be granted in respect of real estate only, although there is no personal estate. Real estate does not include land of copyhold tenure or customary freehold in any case in which an admission, or any act by the lord of the manor, is necessary to perfect the title of a purchaser from the customary tenant. Land Transfer Act, 1897.

The Act does not bind the Crown. *In bonis Hartley*, (1899) P. 40.

In cases not within the Act, a will disposing of real estate only, though the real estate was directed to be converted and debts and legacies were directed to be paid, was not entitled to probate. *In bonis Drummond*, 2 Sw. & T. 118; *In bonis Bootle*, 3 P. & D. 177. Will of realty.

For the purpose of probate the proceeds of sale of land sold under the Settled Estates Act and subject to re-investment in land were treated as realty. *In bonis Lloyd*, 9 P. D. 65.

But if the real estate disposed of was under another instrument held upon trust for sale so as to be converted in equity, the will was entitled to probate. *In bonis Gunn*, 9 P. D. 242.

A will disposing of realty only was entitled to probate if the testator appointed an executor. *In bonis Jordan*, 1 P. & D. 555; *In bonis Miskelly*, I. R. 4 Eq. 62; *In bonis Cubbon*, 11 P. D. 169. Appointment of executor.

The will of a married woman disposing only of real estate belonging to her for her separate use and appointing an executor was, even before the Married Women's Property Act, 1882,

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entitled to probate. *Brownrigg v. Pike*, 7 P. D. 61; *In bonis Hornebuckle*, 15 P. D. 149.

Before the Married Women's Property Act, 1882, the will of a married woman made in pursuance of a power, and taking effect only upon real estate, was not entitled to probate where the married woman survived the coverture without republishing the will, though an executor might be appointed. *O'Dwyer v. Geare*, 1 Sw. & T. 465; *In bonis Barden*, 1 P. & D. 325; *In bonis Tomlinson*, 6 P. D. 209.

## Foreign will.

As regards foreign wills, where a person is in terms appointed executor, probate will be granted to him; but where the powers granted by the will fall short of the powers of executors according to English law, a grant of administration will be made here with powers as near as may be to those granted by the will. *In bonis Earl*, 1 P. & D. 450; *In bonis Briesemann*, (1894) P. 260; *In bonis Von Linden*, (1896) 148.

If the original will cannot be produced in England, a notarial copy may be proved. *In bonis Lemme*, (1892) P. 89; *In bonis Von Linden*, (1896) P. 148.

Where the testator made two wills, one of property vested in him as trustee, the other of his own property, the two wills were included in one probate. *In bonis Claus*, 81 W. R. 924.

## Perfect will presumed to be duly executed.

If a will purports to be properly executed and attested, and there is no doubt that it is the testator's will, the Court will assume that it was properly executed and attested, though the evidence of the attesting witnesses as to the execution may not be satisfactory. This doctrine, of course, does not apply if the recollection of the attesting witnesses as to some defect in execution is clear. *Lloyd v. Roberts*, 12 Moo. P. C. 158; *Wright v. Sanderson*, 9 P. D. 149; *Woodhouse v. Balfour*, 13 P. D. 2; *Wyatt v. Berry*, (1893) P. 5; *Clery v. Barry*, 21 L. R. Ir. 152; *Glorer v. Smith*, 57 L. T. 60; *Dayman v. Dayman*, 71 L. T. 699.

## Affidavit of witness.

In the absence of an attestation clause, or if the attestation clause does not state the performance of the necessary ceremonies, the will must be proved by an affidavit of one of the witnesses. *Bryan v. White*, 2 Rob. 315; *Belbin v.*

*Skeats*, 1 Sw. & T. 148; *Bourman v. Hodgson*, 1 P. & D. 362; *In bonis Wilson*, 1 P. & D. 269. **Chap. IX.**

If no evidence is obtainable from the attesting witnesses, the will will be presumed to have been duly executed, even in the absence of an attestation clause. *Burgoyne v. Showler*, 1 Rob. 5; *In bonis Luffman*, 5 N. of C. 183; *In bonis Dickson*, 6 N. of C. 278; *Vinnicomb v. Butler*, 13 W. R. 392; *In bonis Nicks*, 34 L. J. P. 30; *In bonis Rees*, *ib.* 56; *Foot v. Stanton*, 1 Dea. 19; 2 Jur. N. S. 380; *In bonis Torre*, 8 Jur. N. S. 494; *In bonis Puddephatt*, 2 P. & D. 97; see *In bonis Jones*, 46 L. J. P. 80; *Clarke v. Clarke*, 5 L. R. Ir. 47; *Harris v. Knight*, 15 P. D. 170; *In bonis Malins*, 19 L. R. Ir. 231.

Attesting  
witnesses  
dead.

Declarations by a testator that he has duly executed his will are inadmissible as evidence of its due execution. *In bonis Ripley*, 1 Sw. & T. 68; *Atkinson v. Morris*, (1897) P. 40.

Declarations  
by testator.

A foreign probate will not affect personal property in England, but a duly authenticated copy of a will proved in a foreign country will be admitted to probate in England without further evidence of the validity of the will. *In bonis Smith*, 16 W. R. 1130; *In bonis Earl*, 1 P. & D. 450; *In bonis Hill*, 2 P. & D. 89; *Miller v. James*, 3 P. & D. 5; *In bonis Rule*, 4 P. D. 76; see *In bonis Prince Henry the 69th*, 49 L. J. P. 67; *In bonis Dost Aly Khan*, 6 P. D. 6; *In re Vallance*, 48 L. T. 941.

Foreign  
probate.

Where the will has been proved abroad the codicils must also be proved abroad. *In bonis Miller*, 8 P. D. 167.

As to Scotch confirmations see 21 & 22 Vict. c. 56, sects. 12, 16; *In bonis Ryde*, 2 P. & D. 86; *Hood v. Lord Barrington*, 6 Eq. 218; *In bonis Ewing*, 6 P. D. 19.

As to Irish probates, see 20 & 21 Vict. c. 79, sect. 95.

The question whether documents not in themselves of a testamentary character but incorporated with the will should be included in the probate is mainly one of convenience.

Whether  
incorporated  
document  
should be  
included in  
probate.

If the document is valid in itself independently of the will, it would seem that it need not be included in the probate, if there is a difficulty in procuring its production. *Sheldon v. Sheldon*, 1 Rob. 81; *In bonis Sebthorp*, 1 P. & D. 106; *In bonis Balme*, (1897) P. 261.

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If the document derives its validity from the will it ought, as a general rule, to be included in the probate. *Sheldon v. Sheldon*, *supra*.

If the document incorporated with the will is itself testamentary it should be included in the probate.

Thus, where an English will refers to and incorporates a foreign will the foreign will must be included in the probate, though the executors of the English will may have nothing to do with the property disposed of by the foreign will. *In bonis Harris*, 2 P. & D. 83; *In bonis Lord Howden*, 43 L. J. P. 26; *In bonis Crawford*, 15 P. D. 212; *In bonis Lockhart*, 69 L. T. 21; *In bonis Western*, 78 L. T. 49.

On the other hand, where the testator makes two independent wills, one disposing of property in England and the other of property in a foreign country, probate will only be granted of the English will. *In bonis Coode*, 1 P. & D. 449; *In bonis Astor*, 1 P. D. 150; *In bonis Smart*, 9 P. D. 64; *In bonis Bolton*, 12 P. D. 202; *In bonis Callaway*, 15 P. D. 147; *In bonis De La Rue*, 15 P. D. 185; *In bonis Seaman*, (1891) P. 253; *In bonis Fraser*, (1891) P. 285; *In bonis Tamplin*, (1894) P. 39; *In bonis Murray*, (1896) P. 65.

Where the deceased person makes no disposition of his English property, but leaves a will expressly confined to foreign property, administration of the English property will be granted as upon an intestacy. *In bonis Mann*, (1891) P. 293.

Where a clause of a revoked instrument is incorporated the clause alone will be included in the probate. *In bonis Kehoe*, 7 L. R. Ir. 343.

Where will  
must be  
proved.

Probate of a will must be applied for in the Probate Division, and no proceedings can be taken under a will of personal property till the will has been proved, unless, perhaps, probate is alleged and admitted on the pleadings. *Pinney v. Hunt*, 6 Ch. D. 98; see *Tarn v. Commercial Bank of Sydney*, 12 Q. B. D. 294; *Priestman v. Thomas*, 9 P. D. 210; *Bradford v. Young*, 26 Ch. D. 656; see 29 Ch. D. 617; *In re Masonic and General Life Assurance Co.*, 32 Ch. D. 373.

Probate, how  
far evidence  
as to realty.

By 20 & 21 Vict. c. 77, sect. 62, it is provided that where the will is proved in solemn form, or its validity declared in a

contentious matter, the probate shall be conclusive evidence of the validity and contents of the will in all proceedings affecting real estate.

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Sect. 63 provides for citing the heir. If the heir is a party to a probate action as one of the next of kin and appears and defends, he cannot afterwards dispute the validity of the will in respect of real estate, though he was not cited as heir. *Beardsley v. Beardsley*, (1899) 1 Q. B. 746.

Sect. 64 provides for notice of intention to use the probate of a will not proved in solemn form in an action as evidence of a testamentary disposition affecting realty. *Barraclough v. Greenhough*, L. R. 2 Q. B. 612.

Where the will had not been proved there can be no doubt that before the Land Transfer Act, 1897, an action lay in the Chancery Division to establish it, so far as it related to real estate. For the old practice on this subject, see a valuable note in Mr. Dunning's Concise Precedents, p. 510 *et seq.*

Action to establish will of real estate.

Probate is conclusive upon the question whether the will does or does not express the true will of the testator.

Chancery Division will not set aside will for fraud of legatee.

If the whole or any part of a will is procured by fraud the objection must be taken when probate is applied for.

After probate of a will has been granted no proceedings can be taken in the Chancery Division to have the legatee of the whole or any part of the property bequeathed declared a trustee on the ground of fraud. *Allen v. M'Pherson*, 1 H. L. 191; *Meluish v. Milton*, 3 Ch. D. 27.

It would seem that the same principle would apply even in such a case as that already cited of *Mitchell v. Gard*, 3 Sw. & T. 75, *supra*, p. 24, and see *Betts v. Doughty*, 5 P. D. 26; *In re Birchall*; *Wilson v. Birchall*, 29 W. R. 461.

In a Court of Construction no evidence is admissible to show that a clause was left in the will by mistake. *In re Bywater*: *Bywater v. Clarke*, 18 Ch. D. 17.

## CHAPTER X.

## WHAT PROPERTY MAY BE DISPOSED OF BY WILL.

## Chap. X.

1 Vict. c. 26,  
s. 3.

All property  
may be dis-  
posed of by  
will ;

comprising  
customary  
freeholds and  
copyholds  
without  
surrender  
and before  
admittance ;  
also such of  
them as could  
not be devised  
before the  
Act ;

estates *pur*  
*autre vie* ;

By sect. 3 of the Wills Act, it is enacted that every person may, by his will, bequeath or dispose of "all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator ; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made ; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament,



and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will."

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contingent  
interests;rights of  
entry;and property  
acquired after  
execution of  
will.

A testator cannot give directions which will make his property useless to any one for a term of years; for instance, he cannot direct the windows and doors in every room in his house to be bricked up for twenty years. *Brown v. Burdett*, 21 Ch. D. 667.

Directions to  
brick up  
house.

The effect of sect. 3 of the Act as regards copyholds is to enable the copyholder to devise his estate without a surrender. Until the devisee is admitted the customary estate descends to the heir. Though the lord will not be compelled to admit the heir if there is a devisee, he cannot seize because the devisee refuses to be admitted if the heir is willing to come in. *R. v. Garland*, L. R. 5 Q. B. 269; *Garland v. Mead*, *ib.* 6 Q. B. 441; see *Allen v. Bewsey*, 7 Ch. D. 453.

Devise of  
copyholds.

It has been suggested that lands of a testator dying without heirs which would therefore not devolve upon "the heir-at-law of him," but would escheat to the lord, are not within this section, and therefore that a will disposing of lands in such a case must be executed with the formalities required by the Statute of Frauds. Williams' Real Prop. 17th ed. p. 53, n.; Dunning's Concise Prec. p. 3. But see, as to the construction of a similar clause in a colonial statute, *Wentworth v. Humphrey*, 11 App. C. 619, P. C.; see, too, *Ingilby v. Amcotts*, 21 B. 585.

Lands liable  
to escheat.

It appears to be doubtful whether an estate *pur autre vie* limited to a man and the heirs of his body could be disposed

Whether an  
estate *pur  
autre vie* to a

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man and the  
heirs of his  
body is  
devisable.

of before the Wills Act, if the entail had not been barred. The better opinion seems to be that it could not; see *Campbell v. Sandys*, 1 Sch. & Lef. 294; *Hopkins v. Ramage*, Batty, 365; *Blake v. Luxton*, Coop. 185; *Allen v. Allen*, 2 Dr. & War. 307, 326; and see *Doe v. Luxton*, 6 T. R. 293; see 1 Jarman, 61.

The Wills Act apparently leaves the point where it was, since sect. 3, which makes devisable all real estate which if not devised would devolve upon the heir-at-law, or customary heir, or upon his executor or administrator, does not in terms extend to real estate, which would descend to the heir special if not devised.

A possibility of reverter on failure of a fee simple conditional is devisable. *Pemberton v. Barnes*, (1899) 1 Ch. 544.

Contingent  
interest  
vesting after  
death.

A contingent interest in real or personal estate vesting in a person after his death is transmissible and devisable. *Anon.*, 2 Vent. 347; *Pinbury v. Elkin*, 1 P. W. 568; *Ingilby v. Amcotts*, 21 B. 585; *In re Creswell*; *Parkin v. Creswell*, 24 Ch. D. 102.

Title by  
possession is  
devisable.

A person in possession of land without other title has a devisable interest. *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Clarke v. Clarke*, I. R. 2 C. L. 395; see *Gresley v. Mousley*, 4 De G. & J. 78.

But not the  
right to sue  
in testator's  
name.

The third section does not make any kind of personalty bequeathable which could not be bequeathed before; thus a testator cannot bequeath a promissory note made to him so as to pass the right to sue on it, which remains in the executor. *Bishop v. Curtis*, 18 Q. B. 879.

Property held  
in joint  
tenancy.

Property held by the testator in joint tenancy survives to the other joint tenants and cannot be given by will; thus, for instance, property transferred by the testator into the joint names of himself and his wife where there is nothing to rebut the presumption of advancement cannot be given by will, whether by specific gift or otherwise. *Dummer v. Pitcher*, 2 M. & K. 262; *Coates v. Stevens*, 1 Y. & C. Ex. 66; *Grosvenor v. Durston*, 25 B. 97; *Turner v. A.-G.*, I. R. 10 Eq. 386.

Power to arise  
upon a  
contingency.

A general power to an ascertained person to appoint the use in lands, where the power is to arise only upon a certain

contingency, could always be exercised before the contingency happened. *Dalby v. Pullen*, 2 Bing. 144; 9 J. B. Moo. 300; *Logan v. Bell*, 1 C. B. 872.

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Prior to the Wills Act it was held that a general power to appoint property operating upon the legal estate given to the survivor of two persons could not be exercised till the survivor was ascertained. *Doe v. Tomkinson*, 2 Mau. & S. 165.

Power to contingent person over the legal estate.

This doctrine, however, had no application to equitable estates, and is apparently abolished by the Wills Act. *Thomas v. Jones*, 1 D. J. & S. 63.

A power to be exercised by the survivor of two persons "after the decease of the other of them" can of course not be exercised till the survivor is ascertained. *Care v. Cave*, 8 D. M. & G. 131; *In re Blackburn*; *Smiles v. Blackburn*, 43 Ch. D. 75.

Power exercisable by survivor of two persons.

The ordinary power in a marriage settlement given to the husband and wife, and the survivor of them, appears to come within this principle. The fact, that the power is given to them jointly during their joint lives, shows that neither was intended to exercise it alone during the life of the other. *In re Moir's Trusts*, 46 L. T. 723; see *MacAdam v. Logan*, 3 B. C. C. 310.

A power to appoint to persons living at a certain time cannot be exercised before the time arrives. *Blight v. Hartnoll*, 19 Ch. D. 294.

A power to be exercised by an instrument in writing could always be exercised by will. *Lisle v. Lisle*, 1 B. C. C. 533.

Power to be exercised in writing.

A general power to appoint by deed or instrument, sealed and delivered before a certain period, cannot be exercised by a will which does not take effect till after the period. *Cooper v. Martin*, 3 Ch. 47.

A power to appoint by will to A and others may be exercised after A's death. *Paske v. Haselfoot*, 2 N. R. 568; 33 B. 125.

Where a power of disposition over property is given to a person, the power may be exercised by deed or will, and will not be cut down to a testamentary power without clear words.

Power of disposition not cut down to testamentary power.

Thus a gift to A for life, with a power to dispose of the property then or at or after his decease, gives A a power

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exercisable by deed or will. *Anon.*, 3 Leon. 71, pl. 108; *Ex parte Williams*, 1 J. & W. 89; *Tomlinson v. Dighton*, 1 P. W. 149; 1 Com. 194; *In re David's Trusts*, Jo. 495; *In re Mortlock's Trusts*, 3 K. & J. 456; *Humble v. Bowman*, 47 L. J. Ch. 62; *In re Jackson's Will*, 13 Ch. D. 189; see, too, *Sinnott v. Walsh*, 5 L. R. Ir. 27. The cases of *Kennedy v. Kingston*, 2 J. & W. 481; *Reid v. Reid*, 25 B. 469; *Freeland v. Pearson*, 3 Eq. 658, may be considered overruled.

On the other hand, if any words are used which would be appropriate only to a testamentary gift, such as leave or bequeath, the power can only be exercised by will. *Doe v. Thorley*, 10 East, 438; *Walsh v. Wallinger*, 2 R. & M. 78; *Paul v. Hewetson*, 2 M. & K. 434.

Where a married woman who is tenant for life has power at her decease to dispose of property, the mere fact that the life interest is subject to a restraint on anticipation will not cut down the power to a testamentary power. *In re Waddington*; *Bacon v. Bacon*, W. N. 1897, p. 6 (8).

But the power may be so cut down if there is a restriction upon alienation which affects the *corpus*. *Archibald v. Wright*, 9 Sim. 161; *In re Flower*; *Edmonds v. Edmonds*, 55 L. J. Ch. 200; 34 W. R. 149; 53 L. T. 717.

Under a gift to A for life, with power to dispose of the property for her own use, with a gift over "in the event of her decease, should there be anything then remaining," the tenant for life has no power of disposition by will. *In re Thomson's Estate*; *Herring v. Barrow*, 13 Ch. D. 144; 14 Ch. D. 263; *In re Pounder*; *Williams v. Pounder*, 56 L. J. Ch. 113; 56 L. T. 104.

Power to  
appoint in  
writing  
executed in a  
certain way.

A power to appoint by an instrument in writing executed with certain formalities is exercisable by will executed with those formalities. *Kibbet v. Lee*, Hob. 312; *Smith v. Adkins*, 14 Eq. 402; *Orange v. Pickford*, 4 Dr. 363.

But a power to appoint by will or instrument in writing executed with certain formalities cannot be exercised by a testamentary instrument executed with those formalities, but invalid as a will. *Bainbridge v. Smith*, 8 Sim. 86; *In re Daly's Settlement*, 25 B. 456.

Sect. 10 of the Wills Act enacts that no appointment made by will in exercise of any power shall be valid unless the same be executed in manner thereinbefore required ; and every will so executed shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

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S. 10 of the Wills Act.

Since this section the Court cannot aid the defective execution of a testamentary power of appointment. *In re Kirwan's Trusts*, 25 Ch. D. 373.

Defective execution not aided.

The section applies to powers created since as well as to powers created before the Act. *Hubbard v. Lees*, L. R. 1 Ex. 255.

Applies to powers created since the Act.

The section, however, only applies to powers which are in terms testamentary, and therefore a power to appoint by instrument in writing executed with certain formalities cannot be exercised by a will executed only with the statutory formalities. *West v. Ray, Kay*, 385 ; *Taylor v. Meads*, 4 D. J. & S. 597.

But only to powers testamentary in terms.

By sect. 30 of the Conveyancing and Law of Property Act, 1881, the trust and mortgage estates of testators dying after the 31st December, 1881, vest in their personal representatives. See *post*, p. 201.

Trust and mortgage estates.

Before this Act the question frequently arose whether a trust could be devised, as to which the law appears to have stood as follows :—

When there was a gift to trustees and the survivor of them his heirs and assigns upon trusts to be executed by the trustees and the survivor of them his heirs and assigns, the power of executing the trusts could be devised by the will of the survivor. *Titley v. Wolstenholme*, 7 B. 425 ; *Hall v. May*, 3 K. & J. 585.

When a trust may be devised.

The same rule applied, when the gift was to the trustees, their heirs, executors, and administrators, the word assigns being omitted. *Osborne to Rowlett*, 13 Ch. D. 774 ; see *In re Morton & Hallett*, 49 L. J. Ch. 559 ; 15 Ch. D. 143 ; *In re*

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*Ingleby Boak*, 13 L. R. Ir. 326. The following cases, so far as they decide the contrary, may be considered overruled: *Cooke v. Crawford*, 13 Sim. 91; *Wilson v. Bennett*, 5 De G. & S. 479; *Macdonald v. Walker*, 14 B. 556; *Ashton v. Wood*, 3 Sm. & G. 436; 3 Jur. N. S. 1164.

Property in  
dead body.

The executor is entitled to possession of the testator's corpse, and directions given by the will as to the disposition of the body are invalid. *Williams v. Williams*, 20 Ch. D. 659.

Persons  
having lawful  
custody of  
bodies may  
permit them  
to undergo  
anatomical  
examination  
in certain  
cases.

By the Anatomy Act, 1832 (2 & 3 Will. IV. c. 75), sect. 7, it is enacted that it shall be lawful for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker, or other party interested with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless, to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person shall require the body to be interred without such examination.

Provision  
in case of  
persons  
directing  
anatomical  
examinations  
after their  
death.

By sect. 8 of the same statute it is enacted, that if any person, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, shall direct that his body, after death, be examined anatomically, or shall nominate any party by this Act authorised to examine bodies anatomically to make such examination, and if, before the burial of the body of such person, such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and in case of any such nomination as aforesaid shall request and permit any party so authorised and nominated as aforesaid to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such

person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination. Chap. X.

Upon the question of cremation, see the cases of *R. v. Price*, 12 Q. B. D. 247; *In re Dixon*, (1892) P. 386; *In re Kerr*, (1894) P. 284.

## CHAPTER XI.

## EXECUTORS—GUARDIANS—RELIGIOUS EDUCATION, ETC.

## I.—EXECUTORS.

- Chap. XI.** A TESTATOR may appoint special executors of any portion of his property; see 2 Key & Elphinstone, 5th ed. 795; 4 Dav. Conv. 102; Dunning, Conc. Prec. 485.
- Special executors.** He may also appoint different executors for different countries. *In bonis Wallich*, 1 Sw. & T. 423; *Velho v. Leite*, ib. 456.
- The executor appointed in the country of the testator's domicile is entitled to receive the clear surplus in the hands of limited executors. *Eames v. Hacon*, 18 Ch. D. 347.
- Executors on a contingency.** A testator may substitute other executors in the event of the absence or death of those appointed, and he may appoint a person executor if and when he returns to England. *In bonis Langford*, 1 P. & D. 458; *In bonis Foster*, 2 P. & D. 304; *In re Arbib*, (1891) 1 Ch. 601.
- Delegation of power.** He may delegate the power of appointing executors to another who may appoint himself. *In bonis Cringan*, 1 Hag. 548; *In bonis Ryder*, 2 Sw. & T. 127.
- Married woman executrix.** Since the Married Women's Property Act, 1882, a married woman can act as executrix without her husband's consent. *In bonis Ayres*, 8 P. D. 168.
- Before that Act, if the husband refused his consent, probate was granted to the married woman's attorney. *Clerke v. Clerke*, 6 P. D. 103.
- A person appointed executrix of all property not named in the will is not an executrix of the will or entitled to probate. *In bonis Wakeham*, 2 P. & D. 395.



Where there are several testamentary papers not inconsistent and each appointing sole executors, probate is granted to all the executors. *In bonis Graham*, 3 Sw. & T. 69; *Geaves v. Price*, 3 Sw. & T. 71. See *In bonis Morgan*, 1 P. & D. 323.

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Executors appointed by several instruments.

Reappointment by a codicil of some of the executors appointed by the will together with new executors does not revoke the appointment of executors contained in the will. *In bonis Leese*, 2 Sw. & T. 442; *In re Lloyd*, 1 R. 6 Eq. 348.

A codicil appointing a person "sole" executor of the will revokes the appointment of executors made by the will. *In bonis Lowe*, 3 Sw. & T. 478; *In bonis Baily*, 1 P. & D. 628.

Where a testator appointed A without saying to what office, and afterwards referred to his executor, A was held to be executor. *In bonis Bradley*, 8 P. D. 215; see *In bonis Earl of Leren and Melville*, 15 P. D. 22.

Though no executors are expressly appointed, if the testator has directed any person to pay his debts and administer the estate, such person will be executor according to the tenor. *In bonis Montgomery*, 5 N. of C. 99; *In bonis Adamson*, 3 P. & D. 253; *In bonis Bluett*, 15 L. R. Ir. 140; *In bonis Wilkinson*, (1892) P. 227. See *In bonis Lush*, 13 P. D. 20; *In bonis Russell*; *In bonis Laird*, (1892) P. 380; *In bonis Tandy*, 27 L. R. Ir. 114.

Executor according to tenor.

Thus, trustees to whom the testator's personal estate is given, subject to a charge of debts, are in effect executors. *In bonis Baylis*, 1 P. & D. 21; *In bonis Bell*, 4 P. D. 85; see *In bonis Palmer*, 11 L. R. Ir. 1; *In bonis Hamilton*, 17 L. R. Ir. 277; *In bonis Gray*, 21 L. R. Ir. 249.

A request that certain persons shall act for or with an executrix appointed by the will, makes them executors according to the tenor. *In bonis Brown*, 2 P. D. 110.

Request to act with executrix.

A person appointed to carry out the intentions of the will is executor according to the tenor. *In re Archdall*, 5 L. R. Ir. 168; *In bonis McKane*, 21 L. R. Ir. 1; *In bonis Allam*, 66 L. T. 382.

The appointment of a person sole trustee of a will will not in itself make him executor according to the tenor. *In bonis Punchard*, 2 P. & D. 369; *In bonis Lowry*, 3 P. & D. 157.

Sole trustee not an executor

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See *Boardman v. Stanley*, I. R. 6 Eq. 590; *Smith v. Kerran*, I. R. 11 Eq. 447; *In bonis Earl of Leven and Melville*, 15 P. D. 22.

It seems trustees to whom the residue only is given on trust to pay debts are not executors. *In bonis Love*, 7 L. R. Ir. 178. See *In bonis Toomy*, 3 Sw. & T. 562.

And when in exercise of a testamentary power property is directed to be distributed by the trustees of the settlement, this does not make the trustees executors. *In bonis Fraser*, 2 P. & D. 183.

**II.—GUARDIANS.**

Parents may dispose of the custody of children during minority.

The lands of children and the management of their personal estate by their guardians.

By 12 Car. II. c. 24, sect. 8, a father, whether he is of full age or not, may by deed or will dispose of the custody and tuition of his infant children; and by sect. 9, the person to whom the custody of the children has been so disposed or devised, may take into his custody to the use of such children, the profits of all lands, tenements, and hereditaments of such children, and also the custody, tuition, and management of their goods, chattels, and personal estate, and may bring such actions in relation thereunto, as by law a guardian in common socage may do.

Sect. 1 of the Wills Act declares that the word will shall include a disposition by will of the custody of a child under 12 Car. II. c. 24. It follows that an infant cannot appoint testamentary guardians by will (sect. 7).

Receipt for legacy by testamentary guardian.

The testamentary guardian can give a good receipt for a legacy left to the infant though the Court will not necessarily pay to him a fund belonging to the infant which has been paid into Court under the Legacy Duty Act. *McCreight v. McCreight*, 13 Ir. Eq. 314; *Re Cresswell*, 45 L. T. 468.

An instrument appointing a testamentary guardian is valid though attested by the guardian. *Morgan v. Hatchell*, 24 L. J. Ch. 135.

Father may delegate appointment of guardian.

The statute enables a father to give a testamentary guardian authority to nominate a guardian. *In bonis Parnell*, 2 P. & D. 379.

A father has no legal power to appoint a testamentary

guardian of his illegitimate children, though the person selected by him would in most cases be appointed by the Court. *Sleeman v. Wilson*, 13 Eq. 36; see *Re Ullee; the Nawab Nazim of Bengal's Infants*, 53 L. T. 711; 54 L. T. 286.

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Illegitimate children.

The testamentary guardian has a legal right to the custody of the child, and is entitled to a writ of habeas corpus to obtain possession of his ward. *In re Andrews*, L. R. 8 Q. B. 153; see, too, *In re Ethel Brown*, 13 Q. B. D. 614.

Guardian entitled to custody.

There is nothing to prevent a father from appointing a Roman Catholic ecclesiastic the guardian of his children. *Talbot v. Earl of Shrewsbury*, 4 M. & Cr. 672; *In re Andrews*, L. R. 8 Q. B. 153; *In re Byrnes*, I. R. 7 C. L. 199.

No precise words are necessary to appoint a testamentary guardian.

How guardian appointed.

Thus it is sufficient to direct, that the children are to be brought up under the care and direction of a certain person, or that he is to have the management and care of the house and children, or that he is to take care to see the child educated. *Bridges v. Hales*, Moseley, 109; *Miller v. Harris*, 14 Sim. 540; 9 Jur. 388; *Lady Teynham v. Lennard*, 4 B. P. C. 302.

A person appointed guardian of the estate is not a testamentary guardian. *In re Norbury*, I. R. 9 Eq. 134.

As to the rights of the mother of an illegitimate child, see *Reg. v. Nash*, 10 Q. B. D. 454; *Barnardo v. McHugh*, (1891) 1 Q. B. 194; (1891) A. C. 388; *Re Ullee; the Nawab Nazim of Bengal's Infants*, 53 L. T. 711; 54 L. T. 286.

Before the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), the mother had no testamentary power of appointing guardians, but that Act provides as follows:—

2. On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or

On death of father mother to be guardian alone or jointly with others.

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Mother may  
appoint  
guardians  
in certain  
cases.

guardians appointed by the father is or are dead or refuses or refuse to act, the Court may if it shall think fit, appoint a guardian or guardians to act jointly with the mother.

3. (1) The mother of any infant may by deed or will appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they shall act jointly.

(2) The mother of any infant may by deed or will provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the Court, after her death, if it be shown to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be authorised and empowered so as to act as aforesaid, or make such other order in respect of the guardianship as the Court shall think right.

(3) Authorises the guardians, if they cannot agree, to apply to the Court for directions.

Powers of  
guardian.

4. Every guardian in England or Ireland under this Act shall have all such powers over the estate and the person, or over the estate (as the case may be) of an infant as any guardian appointed by will or otherwise now has in England under the Act 12 Car. II. c. 24, or in Ireland under the Act of the Irish Parliament 14 & 15 Car. II. c. 19, or otherwise.

The Act does not affect the power of the Court to remove a guardian, if it is for the benefit of the infant to do so, but under the Act the mother is the sole guardian, if the father does not appoint, and the Court will not without strong grounds appoint another guardian to act with her. *In re McGrath*, (1893) 1 Ch. 143; *In re X.*; *X. v. Y.*, W. N. (1899) p. 15 (8).

A testamentary appointment of a guardian by the mother under sect. 3 (2) is not invalid because the guardian is not expressed to be appointed jointly with the father. *In re G.*, (1892) 1 Ch. 292.

Act of 1891.

As to the custody of infants, see, too, the Custody of Children Act, 1891 (54 Vict. c. 3). *In re O'Hara*, (1900) 2 Ir. 232.

## III.—RELIGIOUS EDUCATION.

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A father is entitled to direct the religion in which he wishes his children to be brought up after his death, and this right is not affected by the Guardianship of Infants Act, 1886. *In re Scanlan*, 40 Ch. D. 200. Religious education.

The cases show that less weight will be given to the wishes of a deceased than to those of a living father, but even where the father is living the Court will not interfere in favour of the religion selected by the father if he has done anything amounting to an abandonment of his rights, or if the interference would not be for the benefit of the children. *Hawksworth v. Hawksworth*, 6 Ch. 539; *Andrews v. Salt*, 8 Ch. 622; *In re Agar-Ellis*; *Agar-Ellis v. Lascelles*, 10 Ch. D. 49; 24 Ch. D. 317; *In re Clarke*, 21 Ch. D. 817; *In re Walsh*, 13 L. R. Ir. 269; *In re Nevin*, (1891) 2 Ch. 299; *In re McGrath*, (1893) 1 Ch. 143; *In re Magees*, 31 L. R. Ir. 513; *In re Newton*, (1896) 1 Ch. 740.

## IV.—AGENTS, SOLICITORS.

A testator may, there can be no doubt, appoint a person, agent or solicitor to his estate in such a way as to entitle the person to be employed. *Hibbert v. Hibbert*, 3 Mer. 681; *Williams v. Corbet*, 8 Sim. 349. Appointment of agent or solicitor.

But a request that a particular person may be employed as manager or receiver, or a declaration that a particular person is to be the solicitor to the estate, does not impose on the trustees a duty to employ him. *Shaw v. Lawless*, 5 Cl. & F. 129; *Finden v. Stephens*, 2 Ph. 142; *Belaney v. Kelly*, 19 W. R. 1171; *Foster v. Elsley*, 19 Ch. D. 518.

An authority to a solicitor or other professional man who is appointed a trustee to charge for his professional services is in effect a legacy, and he cannot make any charge as against creditors. *In re White*; *Pennell v. Franklin*, (1898) 2 Ch. 217; see *In re Thorley*; *Thorley v. Massam*, (1891) 2 Ch. 613 (legacy duty). Profit costs.

## V.—ADMINISTRATION ACTION.

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Direction to  
administer  
the estate in  
an action.

A direction by the testator to his trustees to commence an action for the administration of his estate by the Court, does not deprive the Court of its discretion to refuse an order, though weight will be given to it by the Court in determining whether an order should be made. *In re Stocken ; Jones v. Hawkins*, 38 Ch. D. 319.

## CHAPTER XII.

### I. THE EQUITABLE DOCTRINE OF ELECTION.

#### A. General Principles.

A TESTATOR can of course only dispose of his own property by will ; however, by means of the doctrine of election, he may in many cases in effect dispose of the property of others. Thus, where a testator disposes of the property of a person, and at the same time gives that person property of his own by his will, the person whose property is given away is bound to elect whether he will keep his own property and surrender an equivalent value of the benefits given him by the will, or whether he will take entirely under the will. *Rogers v. Jones*, 3 Ch. D. 688 ; *Re Carpenter* ; *Carpenter v. Disney*, 61 L. T. 773.

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When election arises.

The person electing must elect to take under or against the whole instrument, will and codicils, and not merely that part of it which disposes of his own property. *Cooper v. Cooper*, L. R. 6 Ch. 15 ; *ib.* 7 H. L. 53.

Legatee must elect for or against the whole instrument, will and codicils,

Two contemporaneous instruments, *e.g.*, a deed under a power and a will, which effectuate one entire disposition, are, for the purposes of raising an election, treated as one instrument. *Kirkham v. Smith*. 1 Ves. Sen. 258 ; *Bacon v. Cosby*, 4 De G. & S. 261 ; *In re Woodleys*, 29 L. R. Ir. 304.

If, however, there is a gift expressly in lieu of dower, or the testator declares that the legatee is to elect only between one of the benefits given him by the will and his own property, election will be confined to that. *Walker v. Inge*, Rom. N. of C. 95 ; *East v. Cook*, 2 Ves. Sen. 30, explained in *Wilkinson v. Dent*, 6 Ch. 339 ; *Coote v. Gordon*, I. R. 11 Eq. 180.

unless the testator limits the election to some particular benefit.

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Gift in satisfaction of a debt will not limit election to that particular gift.

Applies to contingent and reversionary property.

Rights ascertained at testator's death.

Property acquired after testator's death.

Derivative title.

Out of what property compensation to be made.

But a gift, though declared to be in satisfaction of any sums in which the testator may be indebted to the donee at the time of his decease, or in satisfaction of a rent charge, the object being testamentary bounty, will put the legatee to his election to take under or against the whole will. *Wilkinson v. Dent*, 6 Ch. 339; see, too, *Coutts v. Acworth*, 9 Eq. 519.

Election arises whether the property given away by the testator be vested or contingent or in possession or reversion. *Wilson v. Lord Townshend*, 2 Ves. Jun. 693; *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Williams v. Mayne*, 1 R. 1 Eq. 519.

In a case of election arising under a will the testator's death is the time when the rights are to be ascertained. *In re Lord Chesham*; *Carendish v. Dacre*, 31 Ch. D. 466.

Thus there is no election if the property disposed of by the testator is not acquired by the beneficiary till after the testator's death. *Howells v. Jenkins*, 2 J. & H. 706; 1 D. J. & S. 617; *Grissell v. Swinhoe*, 7 Eq. 291; see *Lady Caran v. Pulteney*, 2 Ves. Jun. 544; 3 *ib.* 384.

A case of election arises, though the property given away by the testator belongs to beneficiaries under the will, who derive title to it only as next of kin or as residuary legatees or devisees of a person dead at the testator's death. In the case of a title as next of kin the interest must be estimated as at the death of the intestate, his debts being rateably distributed over his estate. *Cooper v. Cooper*, L. R. 6 Ch. 15; 7 H. L. 53.

A creditor of the intestate who receives a benefit under the will is not put to his election between his claim against the intestate's estate and the benefit under the will, inasmuch as the claim is a mere personal right. *Cooper v. Cooper*, L. R. 7 H. L. p. 66.

The nature of the property out of which compensation is to be made may be such as to negative the intention to put a beneficiary to his election.

Thus, where heirlooms settled with a mansion-house were disposed of by a testator who gave his residue to the tenant for life of the mansion-house, no case of election arose, as the



tenant for life could not dispose of the heirlooms. *In re Lord Chesham ; Cavendish v. Dacre*, 31 Ch. D. 466. Chap. XII.

And it may appear from the instrument that no case of election is intended to be raised, for instance, by the recognition of the title of a person to whom an interest is given to certain property in respect of which he might otherwise have to elect. *In re Wells ; Hardisty v. Wells*, 42 Ch. D. 646.

And a married woman is not put to her election between property belonging to her and a life interest settled upon her with a restraint upon anticipation which cannot be impounded to make compensation. *Smith v. Lucas*, 18 Ch. D. 531; *In re Wheatley*, 27 Ch. D. 606; *In re Vardon's Trusts*, 31 Ch. D. 275; *Hamilton v. Hamilton*, (1892) 1 Ch. 396; reversing *Willoughby v. Middleton*, 2 J. & H. 344. Married woman restrained from anticipation.

But a life interest determinable on alienation may be impounded to make compensation, though the effect is to put an end to it. *McCarogher v. Whieldon*, 3 Eq. 236; *Carter v. Silber*, (1891) 3 Ch. 553; reversed on another point, (1893) A. C. 360. Determinable life interest.

It has been held that a married woman who, under the old law, was unable to dispose of her reversionary interest, was put to her election between that interest which was given away by a testator and a benefit given by the will, but that inasmuch as she could not elect during coverture the legacy must be impounded till she could elect. *Williams v. Mayne*, I. R. 1 Eq. 519; see *In re Lord Chesham*, 31 Ch. D. 466, p. 475; and see *Harle v. Jarman*, (1895) 2 Ch. 419. Married woman's reversion.

As regards property subject to a special power of appointment if the donee of the power appoints to persons not objects of the power and gives benefits to those who take in default of appointment, the latter must elect. *Whistler v. Webster*, 2 Ves. Jun. 366; *Fearon v. Fearon*, 3 Ir. Ch. 19; *Tomkyns v. Blane*, 28 B. 422; *White v. White*, 22 Ch. D. 555; *In re Wheatley*; *Smith v. Spence*, 27 Ch. D. 606; *In re Brookshank*; *Beauclerk v. James*, 34 Ch. D. 160; *In re Wells*; *Hardisty v. Wells*, 42 Ch. D. 646; *King v. King*, 13 L. R. Ir. 531. Property subject to special power.

But this doctrine cannot be used so as to give effect to an Doctrine not applied to

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make valid a  
gift void for  
perpetuity.

appointment which would be void for perpetuity ; for instance, there is no election if an appointment is made which is void for perpetuity and the testator at the same time gives a benefit to the persons entitled in default of appointment. *Wollaston v. King*, 8 Eq. 164 ; *In re Warren's Trusts*, 26 Ch. D. 208 ; *In re Handcock's Trusts*, 23 L. R. Ir. 84.

Appointment  
subject to  
invalid  
restrictions.

And there must be distinguished the case of an appointment to an object of the power followed by invalid restrictions, such as an attempt to settle the appointed fund. In such a case there is no election. The invalid restriction is rejected. *Carver v. Bowles*, 2 R. & M. 301 ; *Blacket v. Lamb*, 14 B. 482 ; *Woolridge v. Woolridge*, Jo. 68 ; *Churchill v. Churchill*, 5 Eq. 44 ; see *Moriarty v. Martin*, 3 Ir. Ch. 26 ; *King v. King*, 15 Ir. Ch. 479 ; *White v. White*, 22 Ch. D. 555.

No election  
between share  
appointed and  
share in  
default of  
appointment.

In order to put a person entitled to claim property in default of appointment to his election, there must be a gift to him of free disposable property. Where there is an appointment to A an object, and to B not an object, A is not put to his election between the share appointed to him and the share he takes in default of appointment. *Bristow v. Warde*, 2 Ves. Jun. 336, p. 350.

Again, if there is an appointment by will to three objects of a power, and then an appointment by deed to one of the three of part of the fund, the one who takes under the deed is not bound to elect between the amounts so appointed by the deed and will. *Montague v. Montague*, 15 B. 565 ; *In re Ashton* ; *Ingram v. Papillon*, (1897) 2 Ch. 574 ; reversed on a different point, (1898) 1 Ch. 142.

Appointment  
under several  
powers.

Where a person is an object of two special powers and an appointment is made to him under the first and an appointment under the second to a person who is an object of the first but not of the second, the appointee under the first power is not bound to elect between his interest in default of appointment under the second power and the appointment made to him under the first. *In re Fowler's Trust*, 27 B. 362 ; *In re Aplin's Trust*, 13 W. R. 1062 ; see, too, *In re Wells*, 42 Ch. D. 646.

No election  
between two  
clauses of

Election arises only between a gift by the will and a title outside the will. It does not arise between two clauses of the

same will. When, therefore, there was an invalid appointment and a residuary gift which was sufficient to pass the amount invalidly appointed, the residuary legatees were not bound to elect between the benefits given to them by the will and the fund invalidly appointed. *Wollaston v. King*, 8 Eq. 165; *Wallinger v. Wallinger*, 9 Eq. 301; *In re Swinburne*; *Swinburne v. Pitt*, 27 Ch. D. 696.

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same  
instrument.

A disappointed legatee may maintain an action against a person who has elected against an instrument to recover the proper compensation. *Rogers v. Jones*, 7 Ch. D. 345.

Right of  
action of  
disappointed  
legatee.

If the person entitled to elect dies before electing, the property given to him and his property which has been given away may go to different persons. In such case there can be no election. But the property given to the deceased person passes charged with the compensation which he would have had to make if he had elected to keep his own property. *Pickersgill v. Rodgers*, 5 Ch. D. 163; *Griffith Boscawen v. Scott*, 26 Ch. D. 358.

Death before  
election.

On the other hand, if the property given to the deceased person and his property which had been given away go to the same persons they can elect. In the case of personalty, where the person who would have had to elect dies intestate, the right of election belongs not to the administrator, but to the next of kin, each of whom has a separate right of election. *Fytche v. Fytche*, 7 Eq. 494.

As between several persons disappointed by an election they are entitled to share in the compensation in proportion to the value of the interests of which they have been disappointed. *Howells v. Jenkins*, 1 D. J. & S. 617.

Apportionment  
of compensa-  
tion.

Where a person electing against an instrument has received payments under it, there is an equity to have those payments made good out of the property he elects to keep, and the equity has priority over the rights of a mortgagee or a trustee under a deed of arrangement. *Codrington v. Lindsay*, 8 Ch. 578; L. R. 7 H. L. 854; *Carter v. Silber*, (1891) 3 Ch. 558; reversed on another point, (1893) A. C. 360; see *Greenwood v. Penny*, 12 B. 403; where the equity was not recognised.

Repayment of  
sums received  
before election  
against  
instrument.

B. *Election arising under Wills.*

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To raise election the testator must actually dispose of something not his own.

In order to raise a case for election under a will there must be on the face of the will a disposition on the part of the testator of something belonging to a person who takes an interest under the will.

The intention to dispose of something not his own must appear on the face of the will, and evidence is not admissible to show that the testator considered certain property as his own, and intended to pass it by words not directly referring to it. See *Pole v. Lord Somers*, 6 Ves. 322; *Doe v. Chichester*, 4 Dow, 76, pp. 89, 90; *Re Booker*; *Booker v. Booker*, 54 L. T. 239; 34 W. R. 346.

Erroneous belief or recital will not raise election.

An erroneous belief on the part of the testator, that certain property has been disposed of in a particular way, even though he expressly declares that he has made his will on the faith of it, will not raise an election. *Langston v. Langston*, 21 B. 552; *Dashwood v. Peyton*, 18 Ves. 27; *Box v. Barrett*, 3 Eq. 244; see *Lewis v. Lewis*, I. R. 11 Eq. 340; *In re Woodleys*, 29 L. R. Ir. 304.

It must be presumed *prima facie* that a testator only means to dispose of what is his own.

1. Cases where testator has no interest in property given away.

General words limited to testator's own property.

Even in wills made before the Wills Act, general words were not construed to apply to property not belonging to the testator, though at the date of his will and his death he had no property of his own to which the words could apply. *Read v. Crop*, 1 B. C. C. 492; *Jerroise v. Jerroise*, 17 B. 566; *Thornton v. Thornton*, 11 Ir. Ch. 474.

Devise in strict settlement where testator has only estate *pur autre vie*.

Nor will the fact that the devise is to uses in strict settlement extend general words to more than the testator's interest, though his devisable interest is only an estate *pur autre vie*. See *Cosby v. Lord Ashdown*, 10 Ir. Ch. 219.

The testator may of course show that he included lands not his own under the general words by describing them as lands in his own occupation. *Honywood v. Foster*, 30 B. 14.

Property in particular place.

If the devise be of property in a particular place, if there

is any property of the testator answering the description it will be confined to that. *Rancliffe v. Parkyns*, 6 Dow, 149; *Maddison v. Chapman*, 1 J. & H. 470. Chap. XII.

Where a testator has transferred stock into the names of himself and his wife, a general gift of his stock, or even a gift of stock exactly the same in amount as that so transferred, will not put the wife to her election. *Dummer v. Pitcher*, 2 M. & K. 262; *Poole v. Odling*, 10 W. R. 337. Property held in joint tenancy.

To raise a case of election there must be a specific reference to the stock in question. *Coates v. Sterens*, 1 Y. & C. Ex. 66; *Grosvenor v. Durston*, 25 B. 97.

For a case where a testatrix being entitled to a debt from A, which was secured by an assignment of a covenant by B, released the debt and covenant, see *Synge v. Synge*, 9 Ch. 128. Release of debt.

2. The case is more difficult where the testator has a devisable interest in certain property, and the question arises whether he intended to give the whole property.

a. Where the testator is entitled in moieties:—

If the devise is of the testator's interest or property in a house or lands, only what belongs to him is intended to pass. *Henry v. Henry*, 1 R. 6 Eq. 286. When the testator is entitled in moieties.

But if the gift is of a house by a particular description, this is a sufficient indication of an intention to pass the whole house, at any rate if there is a direction to repair. *Padbury v. Clark*, 2 Mac. & G. 298; *Howells v. Jenkins*, 2 J. & H. 706. See *Swan v. Holmes*, 19 B. 471. Gift of a house with a direction to repair.

And the result is the same where there is no such direction. *Fitzsimons v. Fitzsimons*, 28 B. 417; *Miller v. Thurgood*, 33 B. 496; *Wilkinson v. Dent*, 6 Ch. 339.

b. Where land is subject to a charge, a devise of the land without more is a devise subject to the charge. *Stephens v. Stephens*, 3 Dr. 697; 1 De G. & J. 62; *Henry v. Henry*, 1 R. 6 Eq. 286. When the testator is entitled to land subject to a charge.

On the other hand, if the testator repudiates the instrument creating the charge, and the dispositions of his will are inconsistent with that instrument, the property is intended to pass freed from the charge. *Sadlier v. Butler*, 1 R. 1 Eq. 415.

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So, too, if the devise of the land is inconsistent with the charge, as if it be for a long term on trust to raise a sum immediately for payment of debts and legacies, the prior charge being itself secured by a long term. *Blake v. Bunbury*, 1 Ves. Jun. 514.

When the testator is entitled to the reversion in lands.

c. Where the testator has a reversionary interest in land, limited to take effect after the decease of persons to whom he gives a life interest in those lands, so that the will would be of no effect if it were intended only to deal with the reversion, and there are besides powers of leasing and management implying actual enjoyment, the intention must have been to dispose of the whole property. *Welby v. Welby*, 2 V. & B. 187; *Wintour v. Clifton*, 21 B. 447; 8 D. M. & G. 641; *Minchin v. Gabbett*, (1896) 1 Ir. 1.

So, too, a direction that an annuity is to be paid to a person for life out of lands of which the testator has only the reversion shows an intention to dispose of the whole. *Usticke v. Peters*, 4 K. & J. 437.

But if in a doubtful case the testator expressly confirms the settlement by which the reversion in the property in question is limited to him, only his own interest will be held to be intended to pass. *Rancliffe v. Parkyns*, 6 Dow, 149.

## 3. Widow's dower and freebench :—

What amounts to an intention to dispose of lands free from dower or freebench.

The question whether the testator has shown an intention to dispose of his real estate, freed from the widow's right to dower or freebench, is of importance only, with regard to the former, in the case of widows married prior to the 1st January, 1834; and with regard to the latter, in the case of wills not coming under the Wills Act; see the Dower Act, 3 & 4 Will. IV. c. 105, ss. 4, 14. *Lacey v. Hill*, 19 Eq. 346.

As to freebench, it was decided in *Lacey v. Hill*, *supra*, that, by virtue of the third section of the Wills Act, a devise of copyholds, though not surrendered to the uses of the will, is sufficient to bar the widow's claim. The point does not appear to have been raised in *Thompson v. Burra*, 16 Eq. 592.

Gift in lieu of dower—

In cases, however, under the old law, the widow is, of course, put to her election if a legacy is given to her expressly in lieu of dower. *Sopwith v. Maughan*, 30 B. 285.

A legacy in lieu of dower would, it seems, also include freebench and dower out of lands which the testator had no power to devise. *Nöttley v. Palmer*, 2 Dr. 93; *Walker v. Walker*, 1 Ves. Sen. 54. See *Wetherell v. Wetherell*, 4 Giff. 51. Chap. XII.  
what it  
includes.

If the dispositions of the will are inconsistent with the widow's right to have her dower set out by metes and bounds, she will be put to her election. This will be the case:— What is in-  
consistent  
with the  
widow's right  
to dower.

a. If a house, being a portion of the property devised, is given for the personal use and occupation of the devisee. *Miall v. Brane*, 4 Mad. 119; *Roadley v. Dixon*, 3 Russ. 192. Personal use  
by the  
devisee.

b. A devise of realty in definite proportions between the widow and others would not itself show that the widow was not intended to take her dower. But if the property is particularised so as to show that the testator is giving not merely his estate, but the whole property itself, this is sufficient to show that dower was meant to be excluded. *Reynolds v. Torin*, 1 Russ. 129; *Chalmers v. Storril*, 2 V. & B. 222, as explained in *Bending v. Bending*, 3 K. & J. 257. See *Roberts v. Smith*, 1 S. & St. 513. In *Dickson v. Robinson*, Jac. 503, the will is not stated. Devise in  
definite  
proportions.

A direction that the proceeds of sale are to be divided in certain shares will not have this effect. *Ellis v. Lewis*, 3 Ha. 314. Trust to sell  
and divide.

c. If powers of leasing are given, even though they be only from year to year. *Reynard v. Spence*, 4 B. 103; *O'Hara v. Chaine*, 1 J. & Lat. 662; *Parker v. Sowerby*, 1 Dr. 488; 4 D. M. & G. 321; *Lowes v. Lowes*, 5 Ha. 501; *Hall v. Hill*, 1 Dr. & War. 94; *Linley v. Taylor*, 1 Giff. 67; see *Warbuton v. Warbuton*, 2 Sm. & G. 163. Powers of  
leasing.

And it seems that a power of leasing is inconsistent with the widow's right to freebench, though it may not be the custom of the manor to set out freebench by metes and bounds. *Thompson v. Burra*, 16 Eq. 592.

But a trust for sale will not have this effect, unless the property given in trust for sale is specifically directed to include something such as a house, the whole of which the testator must have intended to be subject to the trusts. Trust for sale.

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*Gibson v. Gibson*, 1 Dr. 42; *Bending v. Bending*, 3 K. & J. 257; *Parker v. Downing*, 4 L. J. Ch. 198.

Gift of annuity charged on land subject to dower.

The gift of an annuity to the wife, charged upon the property subject to dower, did not put her to election in cases before the Dower Act. *Dowson v. Bell*, 1 Kee. 761; *Harrison v. Harrison*, 1 Kee. 765; *Holdich v. Holdich*, 2 Y. & C. C. 18.

Nor did a devise of a portion of the testator's real estate to his widow prevent her from claiming dower in the rest. *Lawrence v. Lawrence*, 2 Ver. 365; 1 Eq. C. Ab. 218, pl. 2; 1 Freem. 234; 3 B. P. C. 484.

When the heir is put to election.

4. Under the old law, by which a testator could not by a will dispose of lands acquired after the date of the will, the heir was nevertheless put to his election if there was a clear intention to dispose of them.

Disposition of after-acquired lands before the Wills Act.

It is clear that such an intention was sufficiently indicated where the testator drew a distinction between lands to which he was entitled and lands to which he might be entitled at his decease. *Schroder v. Schroder*, Kay, 578; 24 L. J. Ch. 510; *Hance v. Truchitt*, 2 J. & H. 216; see *Plowden v. Hyde*, 2 Sim. N. S. 171; 2 D. M. & G. 684; *Jacob v. Jacob*, 78 L. T. 451, 825; 82 L. T. 270.

And it seems the words "land which I shall die possessed of" sufficiently indicated an intention to pass after-acquired lands, and not merely so much of the lands belonging to the testator at the date of his will as should remain at his death. *Churchman v. Ireland*, 1 R. & M. 250, overruling *Back v. Kett*, Jac. 534.

No election when the will invalid to pass realty.

Under the old law, where the will was insufficiently executed to pass realty, the heir was not put to his election between realty attempted to be disposed of by the will and benefits given to him, so much of the will as attempted to dispose of realty being considered non-existent. *Sheddon v. Godrich*, 8 Ves. 481.

So, too, when under the old law the testator or testatrix was incompetent to dispose of property from infancy or coverture no case of election arose. *Hearle v. Greenbank*, 1 Ves. Sen. 298; 3 Atk. 695, 714; *Rich v. Cockell*, 9 Ves. 370: *In re*



*De Burgh Lawson ; De Burgh Lawson v. De Burgh Lawson*, Chap. XII. 34 W. R. 39 ; see *Blakklock v. Grindle*, 7 Eq. 215.

These rules do not, however, apply to a foreign heir, and therefore if there is clear evidence of an intention to dispose by will of land in Scotland or elsewhere which cannot be so disposed of, the heir is put to his election between the land and the benefits he may take under the will. *Brodie v. Barry*, 2 V. & B. 127 ; *Dewar v. Maitland*, L. R. 2 Eq. 884 ; *Orrell v. Orrell*, 6 Ch. 302. Foreign heir.

It must be clear that land in Scotland or elsewhere is referred to, and therefore general words will only be held to refer to those lands upon which the will can take effect. *Johnson v. Telford*, 1 R. & M. 244 ; *Allen v. Anderson*, 5 Ha. 163 ; *Maxwell v. Maxwell*, 16 B. 106 ; 2 D. M. & G. 705 ; *Maxwell v. Hyslop*, 4 Eq. 407 ; *Baring v. Ashburton*, 54 L. T. 463.

#### C. How election made.

A person who has to elect is entitled to be informed of all the circumstances which may influence his decision, and he will not be bound by an election made in ignorance of the true facts. He may take proceedings to have the value of the property subject to the election ascertained. *Dillon v. Parker*, 1 Sw. 381 ; 1 Cl. & F. 305 ; *Douglas v. Douglas*, 12 Eq. 617. Person electing entitled to information.

There may be election by conduct, but to establish such a case the election must be by a person who has positive information as to his rights to the property, and with that knowledge really means to give the property up. *Stratford v. Powell*, Ba. & Be. 1 ; *Wake v. Wake*, 3 B. C. C. 254 ; 3 Ves. 834 ; *Padbury v. Clark*, 2 Mac. & G. 298 ; *Worthington v. Wiginton*, 20 B. 67 ; *Wilson v. Thornbury*, 10 Ch. 239. Election by conduct.

In the case of infants the Court elects for them, and if necessary directs an inquiry as to what is most beneficial. *Brown v. Brown*, L. R. 2 Eq. 481 ; *Cooper v. Cooper*, L. R. 7 H. L. 53. Election on behalf of infants.

In the case of an infant tenant in tail the Court will make an order under the Trustee Act, 1893, declaring the infant a trustee of the estate of which he is tenant in tail bound by

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the election, and appointing a person to convey. *In re Montagu*; *Faber v. Montagu*, (1896) 1 Ch. 549; 65 L. J. Ch. 372; 74 L. T. 346; 44 W. R. 583.

Election on  
behalf of  
lunatics.

The Court will also elect on behalf of a person of unsound mind so as to bind both his legal and equitable interest in real and personal property. *Wilder v. Pigott*, 22 Ch. D. 263; *In re Earl of Sefton*, (1898) 2 Ch. 378.

Election by  
married  
women.

The authorities as regards election by married women are not in a satisfactory state. A married woman was not under a personal disability to elect as an infant would be. Her disability arose from her limited power under the old law of dealing with her property. For instance, there can be little doubt that a married woman could elect when only her separate estate was in question.

It would seem that where the married woman had no power of disposition over the property affected by the election she could not elect, and the Court could not elect for her. On the other hand, where husband and wife were put to their election as to the wife's fund, which she could with the consent of her husband and after separate examination by the Court dispose of, the Court would direct an inquiry as to which course would be most beneficial, and would elect on her behalf. *Cooper v. Cooper*, L. R. 7 H. L. 53; see *Griggs v. Gibson*, L. R. 1 Eq. 685.

Whether  
married woman  
could affect her  
realty by  
election.

It has been said that a married woman could by election, and without deed acknowledged, affect her real estate not settled to her separate use. See *Barrow v. Barrow*, 4 K. & J. p. 419; *Nicholl v. Jones*, 3 Eq. p. 709. See, too, Swanston's note to *Gretton v. Hayward*, 1 Sw. 409, p. 415.

It may be doubted whether these dicta can be supported by any decided case, unless it be *Ardesoife v. Bennet*, 2 Dick. 463; and they seem contrary to well-established principles. See *Field v. Moore*, 19 B. 176; 2 Jur. N. S. 145; *Cahill v. Cahill*, 8 App. C. 420, 426.

*Ardesoife v. Bennet* was a very peculiar case, and the decision may very well be supported apart from any question of election by a married woman. *Barrow v. Barrow* and other cases of that class are not cases of election in the strict

sense of the word at all. They are cases of confirmation by an adult married woman of a voidable deed entered into before marriage and during minority. Chap. XII.

## II. ELECTION TO CONFIRM INVALID DEED.

Cases of confirmation of instruments entered into by persons under age after they have attained full age are sometimes called cases of election, but they stand on a different footing. They have usually arisen with regard to covenants in marriage settlements to settle some property of the wife who is a minor. Such a covenant is voidable and not void, and unless repudiated within a reasonable time after the wife attains her majority it binds her, and her property as if she had been of full age when she entered into it. *Barrow v. Barrow*, 4 K. & J. 409; *Smith v. Lucas*, 18 Ch. D. 581; *Wilder v. Pigott*, 22 Ch. D. 263; *Greenhill v. North British and Mercantile Insurance Co.*, (1893) 3 Ch. 474; *In re Hodson*; *Williams v. Knight*, (1894) 2 Ch. 421; *Viditz v. O'Hagan*, (1899) 2 Ch. 569; rev. on another point, W. N. 1900, 108. *Smith v. Lucas*, so far as it decided that there was a right to repudiate from time to time as regards any fresh property falling into possession, will not be followed. *Viditz v. O'Hagan*, *supra*. Confirmation of invalid instruments.

## III. ELECTION BY EXPRESS DIRECTION.

A testator may of course impose upon a devisee a condition that he shall in return for the testator's bounty dispose of his own property in a particular way. Election distinguished from condition.

Cases of this kind must be distinguished from cases of election proper. In the latter it is immaterial whether the testator knew or not that the property of which he was disposing was not his own, in the former he must have known that it was not. The characteristic of the former is forfeiture, of the latter compensation. Thus a devise to A on condition of his conveying certain property of his own is not a case for election.

The condition must be complied with, and if the testator

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gives bounty on condition that the beneficiary conveys his or her own property in a particular manner, and the beneficiary cannot do so, the whole bounty fails. See *Boughton v. Boughton*, 2 Ves. Sen. 12.

**Inability to convey.**

The Court could not before the Conveyancing Act, 1881, s. 39, assist a married woman in such a case by removing a restraint upon anticipation so as to enable her to comply with such a condition. *Robinson v. Wheelwright*, 6 D. M. & G. 535.

**Lunatic.**

Where a condition to convey his real estate is imposed upon a lunatic, the Court will elect on his behalf. *In re Earl of Sefton*, (1898) 2 Ch. 378.

**Construction of condition.**

Where the testator directed a residuary legatee to bring an estate into hotchpot, and to convey it so that it might become the property of all his residuary legatees, and the estate had been sold in the testator's lifetime, the condition was held to be satisfied by bringing the purchase-money of the estate into hotchpot. *Middleton v. Windross*, 16 Eq. 212.

**IV. ELECTION BETWEEN ONEROUS AND BENEFICIAL GIFTS.****Onerous and beneficial gifts.**

Where there are several gifts to the same legatee, some of which are onerous and some beneficial, the question has in some cases arisen whether he is bound to take all or none, or whether he can elect to take the beneficial and reject the onerous gift.

The general rule is that where several independent gifts are made to the same legatee the legatee may reject the onerous legacies without forfeiting the others. *Andrew v. Trinity Hall*, 9 Ves. 525; *Moffett v. Bates*, 3 Sm. & G. 468; *Warren v. Rudall*, 1 J. & H. 1; *Aston v. Wood*, 22 W. R. 898; 43 L. J. Ch. 715. *Syer v. Gladstone*, 30 Ch. D. 614, is explained in *Frewen v. Law Life Assurance Society*, (1896) 2 Ch. p. 516.

**Gift of residue or aggregate thing.**

But the legatee of a residue or of property given as one aggregate thing cannot reject so much of the residue or property as is onerous. He must take all or none. *Green v. Britten*, 42 L. J. Ch. 187; *Guthrie v. Walrond*, 22 Ch. D. 573; *In re Hotchkys*; *Freke v. Calmady*, 32 Ch. D. 408; *Frewen v.*

*Law Life Assurance Society*, (1896) 2 Ch. 511 ; *Parnell v. Boyd*, (1896) 2 Ir. 571. **Chap. XII.**

Even where two gifts are given independently the Court may collect an intention that the legatee is not to take one without the other. Such an intention has been inferred from the fact that the testator knew that a leasehold house was underlet at a rent not sufficient to produce the head rent, and accordingly the legatee of the house was held bound to take it, if he took the other benefits given by the will. *Talbot v. Lord Radnor*, 3 M. & K. 252, more fully stated and followed in *Fairtlough v. Johnstone*, 16 Ir. Ch. 442.

## CHAPTER XIII.

## WHO MAY BE DEVISEES OR LEGATEES.

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## 1. Corporations.

1. PRIOR to the Wills Act a devise of lands to a corporation was void, bodies corporate being excepted out of 32 Hen. VIII. c. 1, and 34 & 35 Hen. VIII. c. 5, sect. 5.

And it seems that 43 Eliz. c. 4, had no effect in passing the legal estate where the devise was to a corporation existing for charitable purposes, notwithstanding *Benet Coll. v. Bishop of London*, 2 W. Bl. 1182; see *Incorp. Soc. v. Richards*, 1 Dr. & War. 258.

The Wills Act repeals 32 Hen. VIII. c. 1, and 34 & 35 Hen. VIII. c. 5, but does not expressly authorise devises to corporations, and since the inability of corporations to hold lands was created by various statutes antecedent to 34 & 35 Hen. VIII. c. 5, the mere repeal of that statute does not give validity to devises to corporations.

Since the Wills Act, however, the inability is not in the power of devising, but in the capacity of corporations to take, and it would seem to follow that corporations with power to hold land; such as companies incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), might take by devise except so far as objections might arise on the ground of perpetuity. The question is, however, not likely to be of much practical importance; see *Incorp. Soc. v. Richards*, 1 Dr. & War. 258; *Thomson v. Shakespear*, Joh. 612; 1 D. F. & J. 399; *Carne v. Long*, 2 D. F. & J. 75; *Cocks v. Manners*, 12 Eq. 574; *Chaudière Mining Company v. Desbarats*, L. R. 5 P. C. 277.

A trade union registered under the Trade Union Acts, 1871 and 1876, cannot take land by devise. *In re Amos*; *Carrier v. Price*, (1891) 3 Ch. 159.

2. A gift to a voluntary association which is not charitable is valid, provided it does not tend to a perpetuity. Chap. XIII.

*Stewart v. Green*, I. R. 5 Eq. 470; *Morrow v. M'Conville*, 11 L. R. Ir. 236, so far as they decide that a gift to a voluntary society not charitable is void, because the society has no corporate existence, must be considered overruled. See cases cited below.

Thus a gift of a sum of money to a voluntary association not charitable, which is to go into its coffers, and be spent with its other funds, is valid. *Cocks v. Manners*, 12 Eq. 574; *In re Wilkinson's Trusts*, 19 L. R. Ir. 531.

In some cases such gifts have been construed to be gifts to the individual members composing the association. But such a construction is only possible where the gift to the association is expressed to be for the benefit of the members, or where the association is so described as to indicate the members who compose it. Thus gifts in trust for the Sisters of Mercy at Bantry for the benefit of the Convent of Mercy at Bantry(a), to the Superioress of St. Anne's Convent of Mercy in trust for the community of the convent, and to the Marist Sisters of the Convent of Carrick-on-Shannon(b), have been held gifts to the individual persons who satisfied the description. *In re Delany's Estate*, 9 L. R. Ir. 227; see *Henrion v. Bonham*, O'Leary on Char. cit. 11 L. R. Ir. 241(a); *Bradshaw v. Jackman*, 21 L. R. Ir. 12(b).

2. Voluntary association.

Where individual members may take.

On the other hand, a gift to be applied to the use of and benefit of a convent or to a trade union by its registered name cannot be construed as a gift to the individual members of the convent or trade union. *Morrow v. M'Conville*, 11 L. R. Ir. 236; *In re Amos*; *Carrier v. Price*, (1891) 3 Ch. 159.

In the case of a devise of land to a voluntary association there is the further difficulty that a devise cannot be made to an uncertain body of persons.

Devise of land to voluntary association.

Thus a devise of land to the monks named Christian Brothers, who were a numerous body, was held void on the ground that the intention was to vest the land in them as a body corporate, which they were not. *Hogan v. Byrne*, 18 Ir. C. L. 166; see, too, *Stewart v. Green*, I. R. 5 Eq. 170.

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## 3. Aliens.

3. By the Naturalization Act, 1870 (33 Vict. c. 14), real and personal property of every description, except a British ship, may be taken, acquired, held, or disposed of by an alien in the same manner in all respects as by a natural-born British subject.

As to what constitutes an alien, see *De Geer v. Stone*, 22 Ch. D. 248.

It has been decided that the Act is not retrospective. And apparently it does not apply to a will made before the passing of the Act, though not coming into operation till afterwards. *Sharp v. St. Saureur*, 7 Ch. 343.

In cases before the Act land devised to an alien remained in him till office found, when it devolved to the Crown, whether the land was devised to trustees or not. *Barrow v. Wadkin*, 24 B. 1; *Sharp v. St. Saureur*, 7 Ch. 343.

An alien could always take the proceeds of land devised on trust for sale. *Du Hourmelin v. Sheddon*, 1 B. 79; 4 M. & Cr. 525.

## 4. Felons.

4. Formerly personal property vested in a felon after his conviction, during the period of his punishment or before his pardon, was forfeited to the Crown. *Roberts v. Walker*, 1 R. & M. 752.

But property not vested in a felon till after he had undergone his punishment, or received a pardon, was not forfeited. *Stokes v. Holden*, 1 Kee. 145; *Barnett v. Blake*, 2 Dr. & S. 117; *Gough v. Davies*, 2 K. & J. 623; *Re Thompson's Trusts*, 22 B. 506; *Re Harrington's Trust*, 29 B. 24.

Now, by 33 & 34 Vict. c. 23, forfeiture and escheat for treason, felony, and suicide are abolished; and by sect. 10 all the real and personal property, including choses in action, to which the convict was at the time of his conviction, or shall afterwards become entitled, vests in an administrator appointed under the Act.

By the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), sect. 3, outlawry in consequence of any civil proceeding is abolished.

## 5. Attesting witnesses.

5. By sect. 15 of the Wills Act, a legacy given to an attesting witness, or to the husband or wife of an attesting witness, is void.



The subsequent marriage of an attesting witness to a devisee does not avoid the devise. *Thorpe v. Bestwick*, 6 Q. B. D. 311. Chap. XIII.

A person attesting the signature of two marksmen, witnesses to a will, is himself an attesting witness. *Wigan v. Rowland*, 11 Ha. 157.

But a gift by will to the attesting witness of a codicil is good. *Gurney v. Gurney*, 3 Dr. 208; *Re Marcus*; *Marcus v. Marcus*, 57 L. T. 399.

Where, however, a contingent gift by will is made absolute by a codicil which the legatee attests, and the legatee could only have taken under the codicil, the gift is void. *Gaskin v. Rogers*, L. R. 2 Eq. 284.

And a gift to an attesting witness is void, though there may be a sufficient number of witnesses without him. *Randfield v. Randfield*, 11 W. R. 847, see 8 H. L. 225; *Cozens v. Crout*, 21 W. R. 781. See, however, *In bonis Sharman*, 1 P. & D. 661; *In bonis Smith*, 15 P. D. 2, and *ante*, p. 31.

Where a solicitor-trustee attests a will, a clause empowering him to charge profit costs is avoided by this section. *In re Barber*; *Burgess v. Vinnicombe*, 31 Ch. D. 665; see 34 Ch. D. 77; *In re Pooley*, 40 Ch. D. 1.

A gift to a witness attesting the will is good, if the will is afterwards republished by a codicil referring to it, and is not avoided by the fact that the legatee attests a second codicil. *Anderson v. Anderson*, 18 Eq. 381; *In re Trotter*; *Trotter v. Trotter*, (1899) 1 Ch. 764.

A witness to the will under which a benefit is given him who attests a codicil which confirms the will cannot take under the will. *Re Marcus*; *Marcus v. Marcus*, 57 L. T. 399.

A gift to an attesting witness as trustee is not void. *Cresswell v. Cresswell*, 6 Eq. 69.

A gift to a trustee upon trusts declared by parol in favour of an attesting witness is void. *In re Fleetwood*; *Sidgreaves v. Brewer*, 49 L. J. Ch. 514; 15 Ch. D. 594.

## CHAPTER XIV.

## EVIDENCE—RULES AS TO DESCRIPTION.

## I. WHAT EVIDENCE ADMISSIBLE.

- Chap. XIV.**      **What evidence is admissible.**      **Surrounding circumstances.**      **Terms of art.**      **Evidence of custom.**
- WITH regard to the question what evidence is admissible for the purpose of discovering to what the terms of description employed by the testator refer, evidence of the testator's intention must be distinguished from evidence of circumstances from which the Court may conclude what the testator's intention must have been. The former evidence is admissible only in rare cases. The latter is generally admissible. Thus:—
1. "All facts relating to the subject-matter of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will." *Doe d. Templeton v. Martin*, 4 B. & Ad. 771, 785, per Parke, J.; *Sanford v. Raikes*, 1 Mer. 646.
  2. Words of art, foreign words, nicknames may be explained by evidence. *Kell v. Charmer*, 23 B. 195; *Goblet v. Beechey*, 3 Sim. 24; 2 R. & My. 624; *Lee v. Pain*, 4 Ha. 251; *Studd v. Cook*, 8 App. C. 577; *Bradford v. Young*, 26 Ch. D. 656; see 29 Ch. D. 617.
  3. Where a word has a meaning in common use, but has a different meaning by local custom, evidence of the custom is admissible. *Shore v. Wilson*, 9 Cl. & F. 545, 566; *Richardson v. Watson*, 1 Nev. & M. 575; *Clayton v. Gregson*, 5 A. & E. 802; *Smith v. Wilson*, 3 B. & Ad. 728; *Anstee v. Nelms*, 1 H. & N. 225.

It has been held that, where a measure is defined by statute, evidence is not admissible to show that the word has a different meaning by custom. *O'Donnell v. O'Donnell*, 1 L. R. Ir. 284; 13 *ib.* 226.

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4. Where a word has a meaning in ordinary language, but there is nothing to which it can apply, evidence is admissible to show that the testator used the word in a meaning peculiar to himself. The case falls within the second head above mentioned.

Word with natural meaning but nothing to which it can apply.

5. But if the word has a meaning in ordinary language, and there is something to which it applies, evidence is not admissible to show that the testator used it in a different or wider sense, there being no general custom to that effect. *Millard v. Bailey*, L. R. 1 Eq. 378.

Word with natural meaning and something to which it applies.

6. If lands are devised by a particular title, evidence is admissible to show what the testator habitually included under the name. *Doe d. Beach v. Lord Jersey*, 3 B. & C. 870; 1 B. & Ald. 554; *Ricketts v. Turquand*, 1 H. L. 472; *Webb v. Byng*, 1 K. & J. 580; *Whitfield v. Langdale*, 1 Ch. D. 61 (devise of Claggetts); *Jennings v. Jennings*, 1 L. R. Ir. 552; see *King v. King*, 13 L. R. Ir. 581.

Devise of estate by name.

7. Where a testator devises his estate of A, or at A, and there is an estate answering the description, evidence is not admissible to show in what sense the testator used the expression. *Doe d. Chichester v. Oxenden*, 3 Taunt. 147; 4 Dow, 65; *Doe d. Browne v. Greening*, 3 M. & S. 171.

Devise of estate of or at A.

8. No evidence is admissible to explain a patent ambiguity; for instance, if the testator uses symbols, which on the face of the will require explanation, and have no meaning to any one but himself. *Clayton v. Lord Nugent*, 13 M. & W. 206; see *Sullivan v. Sullivan*, 1 R. 4 Eq. 457.

Patent ambiguity may not be explained.

9. The probate is conclusive as to what the will is, and the original will cannot be looked at for the purpose of altering or correcting the probate. The probate can only be corrected on application in the Probate Division. *Gann v. Gregory*, 3 D. M. & G. 777; *Walker v. Tipping*, 9 Ha. 802, n.; *In re Cliff's Trusts*, (1892) 2 Ch. 229.

When original will may be looked at.

But the Court has in some cases looked at the original

Chap. XIV. will to ascertain the punctuation, the introduction of capital letters, parentheses, and other marks indicating where a sentence begins or ends. *Child v. Elsworth*, 2 D. M. & G. 679, p. 683; *Manning v. Purcell*, 24 L. J. Ch. 522; 7 D. M. & G. 55; *Compton v. Bloxham*, 2 Coll. 201; *Milsome v. Long*, 3 Jur. N. S. 1073.

## II. GENERAL RULES OF CONSTRUCTION.

When the admissible evidence has been taken, the following rules may be of assistance to determine to what the words of description used by the testator refer :—

Where there is something answering the testator's description that alone passes.

1. *Non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram.*

Therefore, where there is property, which exactly fits all the terms of the description, the whole of it passes and no more. *Webber v. Stanley*, 16 C. B. N. S. 698; *Smith v. Ridgway*, L. R. 1 Ex. 331; *In re Seal*; *Seal v. Taylor*, (1894) 1 Ch. 316.

It is immaterial whether the larger words precede or follow the restricting words, provided there is something to which the whole description applies.

Reference to occupation.

Thus, a devise of lands described as in the parish A, and in the occupation of a particular person, will not pass lands not in the occupation of that person. *Doe d. Parkin v. Parkin*, 5 Taunt. 321; *Morrell v. Fisher*, 4 Ex. 591; *Homer v. Homer*, 8 Ch. D. 758.

Reference to title of person from whom lands derived.

So the general description may be restricted by a reference to the person from whom the testator purchased or derived the land. *Doe d. Tyrrell v. Lyford*, 4 M. & S. 550; *Doe d. Conolly v. Vernon*, 5 East, 51; *Doe d. Harris v. Greathed*, 8 East, 91; *Doe d. Ryall v. Bell*, 8 T. R. 579; *Doe d. Newton v. Taylor*, 7 B. & C. 384; *Emuss v. Smith*, 2 De G. & S. 722; *Cooch v. Walden*, 46 L. J. Ch. 639; see *Corballis v. Corballis*, 9 L. R. Ir. 309.

So a devise of cottages and premises "which I have lately purchased" will not include land belonging to the testator which adjoins the cottages, but was not purchased with them. *Cave v. Harris*, 57 L. J. Ch. 62; 57 L. T. 786; 36 W. R. 182.

If the lands are described as being at A in the county of B, lands not in that county will not pass. *Webber v. Stanley*, 16 C. B. N. S. 698; *Pedley v. Dodds*, 2 Eq. 819. Chap. XIV.  
Reference to  
county.

It seems that a devise of lands at A is not to be limited to lands within the parish of A, but would carry immediately adjoining lands in a neighbouring parish. Devise of  
lands at A.

This is clearly the case where the devise is of lands at or near A. *Homer v. Homer*, 8 Ch. D. 758. At or near A.

But a devise of lands at A will not include lands some distance from A where there are lands to which the description applies. *Attwater v. Attwater*, 18 B. 330; *Doe v. Bower*, 3 B. & Ad. 453; see *Doe d. Dell v. Pigott*, 1 J. B. Moo. 274; 7 Taunt. 552; *Pogson v. Thomas*, 8 Sc. 621; 6 Bing. N. C. 337.

A devise of a manufactory on the west side of a street, with the appurtenances, will not include a manufactory on the east side of the street. *Smith v. Ridgway*, L. R. 1 Ex. 46, 331. Manufactory  
in a street.

A devise of property in a street may pass the whole of a piece of land which, when purchased by the testator, had a frontage on that street and on another street, though the testator has subsequently divided the land, and built two houses upon it, one abutting on one street and one on the other. *Harman v. Gurner*, 35 B. 478; see, too, *Newton v. Lucas*, 6 Sim. 54; 1 M. & Cr. 391.

And where the testator had houses in Bullen Court, Strand, and also in the Strand and Maiden Lane, they were all held to pass under a devise of "my freehold estates in Bullen Court, Strand, and Maiden Lane, in the county of Middlesex." *Gauntlett v. Carter*, 17 B. 586.

A devise of two houses in a street will pass only two houses, though the testator may be possessed of three houses in the street held under the same lease, two of which are comprised in one underlease, and the third in a separate underlease. *Tapley v. Eagleton*, 12 Ch. D. 683. Property held  
under lease.

So a devise of certain lands held under a lease where the testator goes on to describe the lands by name passes only such of the lands held under the lease as are named. *West v. Lawday*, 11 H. L. 375.

Sect. 24 of the Wills Act enacts that a will is to be construed, S. 24 of Wills  
Act.

Chap. XIV. with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

Object of s. 24. The object of this section was to annul the old rule by which, as regards real estate, a will was treated as a conveyance, and operated only upon real estate which the testator was entitled to at the date of his will.

The effect of the section is that a will is to be applied to the real and personal estate which the testator has at his death.

But the section does not enact that "we are to construe whatever a man says in his will as if it were made on the day of his death," per Lindley, M.R. *In re Portal & Lamb*, 30 Ch. D. 50, p. 55.

The section has in fact no bearing whatever upon the proper construction of a will. A will from its nature is intended to take effect at a future date. A person who makes a will as a rule intends to dispose of everything belonging to him at his death. He does not intend to die intestate as to part. There is now no reason in law why this intention should not be carried into effect. The Court has to inquire what the testator's property at his death was, and then to apply the language of the will. It is purely a question of construction whether the language is limited to property belonging to the testator at the date of his will or not, though there is a general probability, from the nature of the instrument, that it is not so limited.

Of course in the case of a residuary gift the probability is far greater than in the case of a specific gift, but it is in both cases a question of construction what is intended to pass, and it must not be supposed that this *à priori* probability affords much or any assistance in construing the will.

Whether s. 24  
applies to an  
exception  
from a devise.

It has been suggested that under a devise of land with an exception expressed in general terms, for instance, "all my land except that subject to the trusts of a settlement," sect. 24 of the Wills Act does not apply; and that the exception must, as a matter of law, and not of construction, be limited to lands, subject to the settlement at the date of the will. The true

view seems to be that the exception will be so limited if that is the proper construction of the will; on the other hand, if the proper construction is that it is intended to include lands subject to the settlement at the date of the death, it will include them. In other words, sect. 24 does not affect the matter either way. *Hughes v. Jones*, 1 H. & M. 765, where upon the construction of the will the exception was limited to lands settled at the date of the will.

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A specific devise may be so framed as to be limited to property which the testator owns at the date of the will, or it may be so framed as to include any property covered by the description which he owns at his death.

Specific devise may include after-acquired property.

Thus under a devise of the Cleeve Court estate, lands acquired since the date of the will and treated by the testator as part of the estate were held to pass. *Castle v. Fox*, 11 Eq. 542; *In re Midland Railway Co.*, 34 B. 525.

Devise of Cleeve Court.

On the other hand, under a devise of "my Quendon Hall Estates," only lands known by that name at the date of the will were held to pass. It was shown that the expression "Quendon Hall Estates" had in the mind of the testatrix a definite meaning at the date of the will, and there was nothing to show that the meaning had been extended so as to include lands subsequently added to the estate. *Webb v. Byng*, 1 K. & J. 580.

Quendon Hall Estates.

The use of the present tense, for instance, a devise of lands "of which I am seised," though in another gift the testator gives "what I am or at my death shall be possessed of," will not restrict a general devise to property belonging to the testator at the date of the will. *Doe d. York v. Walker*, 12 M. & W. 591; *Lady Langdale v. Briggs*, 3 Sm. & G. 246; 8 D. M. & G. 391; *Hepburn v. Skirring*, 4 Jur. N. S. 651; *Lord Lilford v. Powys Keck*, (No. 2) 30 B. 300.

Use of the present tense.

On the other hand, the word "now" used in the description of property refers to the date of the will, and, if it is an essential part of the description, it limits the gift to property then belonging to the testator. *Cole v. Scott*, 1 M. & G. 518; *Hutchinson v. Burrow*, 6 H. & N. 583; *Williams v. Owen*, 2 N. R. 585; *Re Edwards*; *Rowland v. Edwards*, 63 L. T. 481.

Effect of the word now.

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If, on the other hand, such words as “now occupied by me” or the like are merely added as an additional description not intended to cut down the generality of the earlier words, the devise will not be restricted to property belonging to the testator at the date of the will. *In re Midland Railway Co.*, 34 B. 525; *Wagstaff v. Wagstaff*, 8 Eq. 229; *In re Ord*; *Dickinson v. Dickinson*, 12 Ch. D. 22; *In re Champion*; *Dudley v. Champion*, (1893) 1 Ch. 101.

Effect of  
republication  
by codicil.

Under the old law a codicil to a will had the effect of republishing the will, so that under a general devise in the will, or even under a specific devise, if the language was appropriate, after-acquired real estate passed.

Even where the codicil referred only to the land “devised by the will” if it confirmed the will, the effect was held to be the same as if the testator had made a new will at the date of the codicil. *Doe d. York v. Walker*, 12 M. & W. 591; *Lady Langdale v. Briggs*, 3 Sm. & G. 246.

Upon the same principle a codicil made after coverture republishing the will of a married woman made during coverture would make the will effective to pass property which the married woman could not dispose of during coverture, and where a power was conferred on the survivor of husband and wife exercisable after the death of one, a will made during the coverture, but republished by a codicil after the coverture was held to execute the power. *In re Smith*; *Bilke v. Roper*, 45 Ch. D. 632; *In re Blackburn*; *Smiles v. Blackburn*, 43 Ch. D. 75.

But the effect of the republication of a will by a codicil was a question of construction, and if the codicil referred in terms only to the land devised by the will and did not confirm the will but was only directed to be taken as part of it, the republication did not enlarge the effect of the will. *Bowes v. Bowes*, 2 B. & P. 500; *Hughes v. Turner*, 3 M. & K. 666; *Monypenny v. Bristow*, 2 R. & M. 117; *Re Taylor*; *Whitby v. Highton*, 58 L. T. 848.

As from  
what date  
republished  
will speaks.

The principal operation of the rule as to republication was to give effect to the intention by making a will, which on the face of it was intended to include after-acquired real estate



effectual to pass it. It cured the infirmity of the will and gave effect to the intention. The effect of republication in cases where the rule is not required for that purpose is a different question. There are some passages in the judgment in *Doe d. York v. Walker* (12 M. & W. 591), which go to show that confirmation of a will by a codicil makes the will speak as if it had been re-executed on the date of the codicil, so that "now" would refer, not to the date of the will but to the date of the codicil. It is easy to imagine cases in which this would destroy the testator's intention. The better opinion probably is that it must be ascertained as a question of construction upon all the documents what the effect of republication is. See *In re Champion*; *Dudley v. Champion*, (1893) 1 Ch. 101.

2. *Falsa demonstratio non nocet, cum de corpore constat.*

a. Thus, where an object is sufficiently described, additional words, which have no application to anything, may be rejected. *Blague v. Gold*, Cro. Car. 447, 473; *Doe d. Dunning v. Cranston*, 7 M. & W. 1.

Inaccurate  
description—  
part  
inaccurate;

b. Where there is a complete description, and the testator goes on to add words for the purpose of identifying or elaborating the previous description, these words, if inconsistent with the previous description, may be rejected. *Armstrong v. Buckland*, 18 B. 204; see *Slingsby v. Grainger*, 7 H. L. 273; *Travers v. Blundell*, 6 Ch. D. 436.

Subordinate  
description  
if inaccurate  
rejected.

c. Where there is one continuous description, and there is something answering to part of it, and something answering to other part, but the two together are inconsistent, the question is, which are the leading words of description.

Inconsistent  
description.

In the first class of cases under this head there is no repugnancy between the general terms and the particular superadded description, in the second and third class there is a repugnancy between two parts of a description.

Where the estate is devised by a specific name, followed by a reference to occupation, the reference to occupation may be rejected if the whole estate known by the name is not in the occupation of the person referred to. *Goodtitle d. Radford v. Southern*, 1 M. & S. 299; *Down v. Down*, 7 Taunt. 343;

Name  
followed by  
occupation.

**Chap. XIV.** 1 J. B. Moo. 80; see *Doe d. Beach v. Earl of Jersey*, 1 B. & Ald. 550; 3 B. & Cr. 870; *Paul v. Paul*, 1 W. Bl. 255; 2 Burr. 1089; see, too, *Cunningham v. Butler*, 3 Giff. 37; 7 Jur. N. S. 461; *In re Boulter*, 4 Ch. D. 241.

Name  
followed by  
locality.

Upon similar principles a description by a specific name will prevail over an erroneous reference to a parish or county, or to acreage. *Hardwick v. Hardwick*, 16 Eq. 168; *Whitfield v. Langdale*, 1 Ch. D. 64.

Freehold farm.

Under a devise of "my freehold farm and lands, situate at Edgware, and now in the occupation of A," the whole farm consisting of 50 acres of freehold and 26 acres of copyhold land was held to pass. There was no residuary devise, and there was no reasonable doubt on the will that the whole farm was meant to pass. *In re Bright-Smith*; *Bright-Smith v. Bright-Smith*, 31 Ch. D. 314; and see the comments there made upon *Stone v. Greening*, 13 Sim. 390; *Hall v. Fisher*, 1 Coll. 47.

Though the estate is not described by a specific name, if the general description contains words which would not be satisfied if the reference to occupation is allowed to restrict the devise, the reference to occupation may be rejected. *White v. Birch*, 36 L. J. Ch. 174; see *Doe d. Parkin v. Parkin*, 5 Taunt. 321.

What are the  
leading words.

For the purpose of ascertaining the leading words, it would seem that where a description is followed by restrictive words inconsistent with it, the earlier words will prevail, especially if the restrictive words are less clear and accurate than the earlier words. Cases *supra* and *Doe d. Remow v. Ashley*, 10 Q. B. 663.

Where the more restrictive description of property is followed by a wider description, which would include other property as well, it seems the more restricted description will prevail; for instance, under "my lands in Cokefield, called Hayes Lands," only so much of the Hayes Lands as were in Cokefield passed. *Wodden v. Osbourn*, Cro. El. 674; *Hall v. Fisher*, 1 Coll. 47.

Of course, if the restrictive words can be looked upon as inserted for the purpose of giving the lands carved out of the devise to some one else, they will have their full force.

*Higham v. Baker*, Cro. Eliz. 16; *Press v. Parker*, 10 J. B. Moo. 158; 2 Bing. 456. Chap. XIV.

3. Where there is nothing answering to any part of the description the devise fails. No property answering description.

Thus a devise of lands in a particular county or parish cannot be extended to lands in an adjoining county or parish, though those may be the only lands the testator possessed. *Miller v. Travers*, 8 Bing. 244; *Barber v. Wood*, 4 Ch. D. 885.

4. The same rules are applicable to specific bequests of personal property. Therefore, if there is something which answers fully the words of description, that and that alone will pass. *Slingsby v. Grainger*, 7 H. L. 273; *Ridge v. Newton*, 2 D. & War. 239; *Ex parte Kirk*; *In re Bennett*, 5 Ch. D. 800; *Dillon v. Arkins*, 13 L. R. Ir. 557; 17 L. R. Ir. 636; *In re Bodman*; *Bodman v. Bodman*, (1891) 3 Ch. 135. Same rules apply to specific bequests.

5. In some cases the effect of a specific gift may be to give the legatee a right of selection. Right of selection.

For instance, a gift of two acres out of four, or a gift of a house and ten acres of land adjoining where the testator has more than ten acres, gives the devisee the right in each case to select. *Grace Marshall's Case*, Dyer, 281a, n.; 8 Vin. Ab. 48, pl. 11; *Hobson v. Blackburn*, 1 M. & K. 571.

Again, the testator may give a certain number of shares and he may have a larger number, some being fully paid, some partly paid. In such a case the legatee may select the fully-paid shares. *Jacques v. Chambers*, 2 Coll. 435; *Millard v. Bailey*, L. R. 1 Eq. 378. Gift of certain number of things where testator has larger number.

It appears to be immaterial whether it is disclosed on the face of the will that the testator is possessed of several of the things specifically given, or whether this only appears by evidence outside the will. For instance, if the testator has two closes called Whiteacre, it is immaterial whether he gives "my close Whiteacre," or "one of my closes called Whiteacre." In either case the devisee may select. *Tapley v. Eagleton*, 12 Ch. D. 683; not following *Richardson v. Watson*, 4 B. & Ad. 787.

If having two closes in X, the testator gives a close in X to A, and a close in X to B, the beneficiaries must select, and Priority of selection.

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apparently they are entitled to select according to the priority in which they are named in the will. *Duckmanton v. Duckmanton*, 5 H. & N. 219.

What would happen if the person entitled to select dies before selecting is not clear. Probably the gift would fail. See *Bullock v. Burdett*, Dyer, 281a; Co. Lit. 145a; *Boyce v. Boyce*, 16 Sim. 476.

Incomplete  
selection by  
testator.

If the testator himself intends to select the article but his selection remains incomplete, so that it is impossible to say what article is intended to pass, the gift fails. For instance, if the testator has several horses, a gift of my horse with a blank left for the name would fail. So where the testator had four houses in Sudeley Place, and gave a house, being No. (leaving the number blank), to one son, followed by devises in similar terms to each of his three other sons, the gifts failed. *Asten v. Asten*, (1894) 3 Ch. 261.

Express  
right of  
selection.

In some cases testators give an express right of selection. For instance, gifts of such articles of furniture and the like as the beneficiary may select are not uncommon. In such cases the rule is that the beneficiary may take the whole. Upon the language of the will the beneficiary might take everything, with the exception of an article of no value, and the maxim *de minimis non curat lex* applies. *Arthur v. Mackinnon*, 11 Ch. D. 385; *Re Sharland*; *Kemp v. Rozey*, 74 L. T. 664; where *Kennedy v. Kennedy*, 10 Ha. 438, is explained.

Increase in  
value of  
specific legacy  
before the  
testator's  
death passes  
to legatee,  
unless the  
description  
excludes it.

6. In the case of a specific bequest, even before the Wills Act, any increase between the date of the will and the death of the testator in the value of the thing specifically given belonged to the legatee. Thus a gift of the amount of a bond carried the accruing interest. *Harcourt v. Morgan*, 2 Kee. 274; *All Souls' Coll. v. Codrington*, 1 P. W. 597.

But if the description of the gift is such as to preclude the possibility of including in it any increase, such increase will not pass, as if the gift be of 300l. due to me on a bond, interest will not pass. *Roberts v. Kuffin*, 2 Atk. 112; *Hawley v. Cutts*, 2 Freem. 24.

Inaccurate  
description.

7. If there is a specific gift, as, for instance, of certain stock, and the testator at the date of his will possessed no

such stock, but possessed other stock nearly answering the description, the latter will pass. Chap. XIV.

Upon this principle Bank stock has been held to pass as East India Stock (*a*); 3 per cent. South Sea Annuities as 3 per cent. Consols (*b*); 3 and 5 per cent. Bank Annuities as money in the Bank of England (*c*); 3 per cent. Reduced Annuities as Long Annuities (*d*); 3 per cents. in the names of trustees over which a testatrix had a general power of appointment as "monies invested in my name in the 4 per cent. Government securities" (*e*); Consols in the names of trustees as property "which stands in the English Bank" of Coutts & Co., who received the dividends (*f*); stock in the names of trustees as stock "in my name" (*g*); French Rentes in the names of the testator's agents as French Rentes "inscribed in my name" (*h*); Wilts and Somerset Stock of the Great Western Railway Company, and preference and other stock of that company, as "my shares in the Great Western Railway" (*i*); a deposit receipt and cash at a bank as "all I hold" in that bank; a bond of a company as shares of that company, and shares of a company as bonds of that company, and debenture stock of a company as shares of that company (*j*); 6,800 dollars United States Bonds as "my 7,000 dollars or the produce thereof" (*k*); debentures of a company as "debenture stock or shares" of that company (*l*); and 200*l.* stock of a company as two shares of that company, which never had shares but stock only (*m*). *Door v. Geary*, 1 Ves. Sen. 255 (*a*); *Dobson v. Waterman*, 3 Ves. 307, n. (*b*); *Gallini v. Noble*, 3 Mer. 691 (*c*); *Pentecost v. Ley*, 2 J. & W. 207 (*d*); *Mackinley v. Sison*, 8 Sim. 561 (*e*); *Sheffield v. Von Donop*, 7 Ha. 42 (*f*); *Quennell v. Turner*, 13 B. 240 (*g*); *Ellis v. Eden*, 25 B. 482 (*h*); *Trinder v. Triuder*, L. R. 1 Eq. 695 (*i*); *Townsend v. Townsend*, 1 L. R. Ir. 180; *In re Weeding*; *Armstrong v. Wilkin*, (1896) 2 Ch. 364 (*j*); *Palin v. Brookes*, 26 W. R. 877 (*k*); *In re Nottage*; *Jones v. Palmer*, (No. 2) (1895) 2 Ch. 657 (*l*); *Brannigan v. Murphy*, (1896) 1 Ir. 418 (*m*).

It is not clear what the result would be if the testator after the date of his will acquires property exactly answering the description. See *In re Weeding*, *supra*.

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Gift of  
estate may  
pass proceeds  
of sale.

If the testator devises an estate by name when in fact he has an interest only in the proceeds of sale of the estate, that interest passes. *Cooper v. Martin*, 3 Ch. 47; *In re Lowman*; *Derenish v. Pester*, (1895) 2 Ch. 348.

But a general gift of leaseholds will not pass the proceeds of sale of leaseholds which at the date of the will the testator had contracted to sell. *Goold v. Teague*, 7 W. R. 84; 5 Jur. N. S. 116.

Specific gift  
of something  
the testator  
has sold  
before the  
date of the  
will.

8. If a testator makes a specific bequest of something which he has not at the date of the will, evidence is admissible to show how the mistake arose, and the fact that the thing in question has been exchanged for something else before the date of the will, will not avoid the legacy. In such a case the legatees are entitled to a sum equal in value to the specific legacy at the testator's death. *Selwood v. Mildmay*, 3 Ves. 306; *Lindgren v. Lindgren*, 9 B. 358; *Goodlad v. Barnett*, 1 K. & J. 341.

Gift of some-  
thing the  
testator  
thinks he has  
but has not.

9. On the other hand, if the testator makes a specific gift of a thing he thinks he has, but never had, or of a thing which he intends to purchase, but does not, the gift is void. *Waters v. Wood*, 5 De G. & S. 717; *Evans v. Tripp*, 6 Mad. 91; *Millar v. Woodside*, 1 R. 6 Eq. 546.

Effect of sale  
of thing  
specifically  
given and  
purchase of  
similar thing.

10. If a testator devises a specific thing, such as "my house in Grosvenor Square," and then sells the house and buys another house in Grosvenor Square, there can be little doubt that the latter will not pass. The gift is of a specific thing he has at the date of the will and no other thing will pass. *In re Gibson*; *Mathews v. Foulsham*, L. R. 2 Eq. 669. There are some observations to the contrary in *Castle v. Fox*, 11 Eq. 542, p. 551, which cannot now be considered in accordance with the law. See *In re Portal & Lamb*, 30 Ch. D. 50.

Confirmation  
by codicil.

11. If the testator sells the specific thing and buys another thing closely resembling the former, the subsequent confirmation of the will by a codicil will not have the effect of passing the fresh acquisition, if the description in the will is not accurately appropriate to it. *Pattison v. Pattison*, 1 M. & K. 12; *Macdonald v. Irvine*, 8 Ch. D. 101; see

*Pilkington's Trusts*, 6 N. R. 246 ; and see Chapter XVII. as to Chap. XIV.  
Ademption.

12. Possibly a specific gift, for instance, "of my stock," might pass stock which the testator had at his death agreed to purchase. See *Collison v. Girling*, 4 M. & Cr. 63, p. 75. Stock intended to be purchased.

But it would not include stock which the testator has directed his brokers to purchase, but which is not in fact purchased till after his death. *Thomas v. Thomas*, 27 B. 537.

## CHAPTER XV.

## SPECIFIC, GENERAL, AND DEMONSTRATIVE LEGACIES.

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General and  
specific  
legacies dis-  
tinguished.

IN the case of bequests of personalty it is often a question of difficulty whether a legacy is general or specific. A general legacy is a legacy not of any particular thing, but of something which is to be provided out of the testator's general estate. If a particular fund is made primarily liable the legacy is demonstrative, but does not fail by the failure of the particular fund. On the other hand, a specific legacy is a gift of a severed or distinguished part of the testator's property. It does not abate till after the general legacies are exhausted, but it is liable to ademption by the testator in his lifetime.

If the legacy is general, the legatee is entitled to have its value paid him out of the estate, but if it is impossible to say what the value is, the legacy fails for uncertainty. *In re Gray; Dresser v. Gray*, 36 Ch. D. 205.

The most common, though not the only kind of specific legacy, is where the testator gives something which he possesses at the date of the will.

In those cases there must be on the face of the will enough to show that the testator is referring to something actually existing at the time.

Legacy of  
stock is not  
specific.

A mere legacy of stock in round numbers, though the testator may possess the exact amount of stock, is not specific. *Partridge v. Partridge*, 9 Mod. 269; *Ca. t. Talb.* 226; *Simmons v. Vallance*, 4 B. C. C. 345; *Wilson v. Brownsmith*, 9 Ves. 180.

Nor of money  
in stock.

Similarly, a bequest of 5,000*l.* in the South Sea Company's Stock is general, though the testator may have the exact



amount at the date of his will. *Purse v. Snaplin*, 1 Atk. 415; *Bronsdon v. Winter*, Amb. 57; *Bishop of Peterborough v. Mortlock*, 1 B. C. C. 565; *Webster v. Hale*, 8 Ves. 410; *Robinson v. Addison*, 2 B. 515; *Macdonald v. Irvine*, 8 Ch. D. 101; *In re Gray*; *Dresser v. Gray*, 36 Ch. D. 205; see *Page v. Young*, 19 Eq. 501, where a gift of "the interest of 4,500*l.*, money in the funds," was held specific. Chap. XV.

As to whether the gift is of so much money to be invested in stock, or of stock of that value, see *Allan v. Kelly*, 7 W. R. 139.

But though the actual gift may not contain anything to show that it is specific, it may appear from the rest of the will that it is so.

A direction to transfer a certain amount of stock, or to pay it as soon as possible, will not make the legacy specific. *Sibley v. Perry*, 7 Ves. 522, 529; *Webster v. Hale*, 8 Ves. 410. Nor of stock to be transferred.

But a gift of stock generally to trustees on trust to sell, shows that the testator referred to specific stock. *Ashton v. Ashton*, Ca. t. Talb. 152; 3 P. W. 384. Gift on trust to sell is specific.

So where a testator, having given legacies of stock generally, then gives the rest of the stock "standing in my name," the earlier legacies must be specific. *Sleech v. Thorington*, 2 Ves. Sen. 560; see *Millard v. Bailey*, L. R. 1 Eq. 378. Gift of rest of my stock makes previous gifts of stock specific.

A direction that if the testator should not have sufficient stock standing in his name to answer the legacies of stock previously given, the executors should purchase sufficient to make up the deficiency, shows that the testator meant to give something in existence at the time. *Townsend v. Martin*, 7 Ha. 471; *Fountaine v. Tyler*, 9 Pr. 94; *Queen's Coll. v. Sutton*, 12 Sim. 521. Direction to purchase if the testator should not have sufficient stock to answer legacies of stock previously given.

The same is the case with a gift of 4,000*l.*, capital stock, in the 3 per cent. Consolidated Bank Annuities, "or in whatsoever of the Government funds the same should be found invested." *Hosking v. Nicholls*, 1 Y. & C. C. 478.

If the legacy is not of stock in round numbers, but, for instance, of 2,702*l.* 3*s.* Bank Annuities, and the testator has the exact amount, it would seem the argument in favour of specific gift is much stronger. *Jeffreys v. Jeffreys*, 3 Atk. 120; see *Robinson v. Addison*, 2 B. 515. Legacy of stock not in round numbers where the testator has the exact amount.

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Gift of "my" stock.

Effect of Wills Act.

A gift of "my" stock is specific. *Ashburner v. Macquire*, 2 B. C. C. 108; *Miller v. Little*, 2 B. 259.

The effect of the Wills Act upon such a gift is to leave it specific, though it includes all the stock of the particular description belonging to the testator at his death. *Lady Langdale v. Briggs*, 8 D. M. & G. 391; *Trinder v. Trinder*, L. R. 1 Eq. 695; *Bothamley v. Sherson*, 20 Eq. 304.

Gift of part of specific fund.

A gift of a part of a specific fund is specific. *Ford v. Fleming*, 1 Eq. Ca. Ab. 302, pl. 3; 2 P. W. 469; *Nelson v. Carter*, 5 Sim. 530; *Oliver v. Oliver*, 11 Eq. 506; *McClellan v. Clark*, 50 L. T. 616.

So, too, a gift of a specific thing to be sold and divided in definite shares among several persons is a gift of specific legacies. *Page v. Leapingwell*, 18 Ves. 463; *Jeffrey's Trusts*, L. R. 2 Eq. 68.

Gift of money out of money.

Similarly, a gift of money "out of" specific money, or of stock "out of" specific stock, is specific; as, for instance, money out of the dividends of stock, or money out of money invested in stock. *Drinkwater v. Falconer*, 2 Ves. Sen. 623; *Morley v. Bird*, 3 Ves. 628; *Hosking v. Nicholls*, 1 Y. & C. C. 478; *Badrick v. Stevens*, 3 B. C. C. 431; *Mullins v. Smith*, 1 Dr. & Sm. 204.

Money out of stock.

On the other hand, a gift of money out of stock is not specific, but demonstrative. *Kirby v. Potter*, 4 Ves. 748; *Deane v. Test*, 9 Ves. 146.

Independent gift followed by a direction to pay out of a certain fund.

If there is an independent gift of money, followed by a direction to pay it out of certain specific moneys, the legacy is demonstrative. *Roberts v. Pocock*, 4 Ves. 150; *Acton v. Acton*, 1 Mer. 178.

Similarly, a gift of "5,000*l.* or 50,000 rupees now vested in Company's bonds" is demonstrative. *Gillaume v. Adderley*, 15 Ves. 384.

Gift of 100*l.* of my funded property.

Where the gift is not "out of" but "of" only, as 100*l.* of my funded property, it is more difficult to decide under which of the two last heads the gift falls. It seems, however, that if the testator estimates his stock in money, a gift of 100*l.* of my stock is specific. *Davies v. Fowler*, 16 Eq. 308; see *Brennan v. Brennan*, I. R. 2 Eq. 321.

But if he does not, and makes merely a gift of 100*l.* of my funded property, it is equivalent to a gift of money out of stock, and is therefore not specific. *Lambert v. Lambert*, 11 Ves. 607.

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In some cases a difficulty may arise whether the testator meant money out of money or money out of stock.

Whether a gift is of money out of money or of money out of stock.

It is clear that a gift of "2,000*l.* Long Annuities now standing in my name" is specific, though the testator may only have had a much smaller sum. *Gordon v. Duff*, 28 B. 519; 3 D. F. & J. 662.

Whether it is a gift of Long Annuities to the amount of 2,000*l.* a year or of 2,000*l.* in gross seems doubtful, but probably this would depend on the state of the testator's property.

But if the gift is of "50*l.* of Bank Long Annuities Stock standing in my name," as such stock has no existence, and the gift might equally well be of a lump sum of 50*l.*, or of 50*l.* per annum, it is necessary to refer to the state of the testator's property to discover what he may have meant, and whether the gift is of 50*l.* per annum Long Annuities, or of the sum of 50*l.* to be paid out of Long Annuities. If the property is insufficient to satisfy the legacies, if construed as legacies of so much per annum Long Annuities, the legacies will be demonstrative legacies of so much money out of Long Annuities. *Boys v. Williams*, 3 Sim. 563; 2 R. & M. 688. See *A.-G. v. Grote*, 3 Mer. 316; 2 R. & M. 699; *Colpoys v. Colpoys*, Jac. 451, and *Fonnereau v. Poyntz*, 1 B. C. C. 471, as explained by Lord Eldon, 6 Ves. 400.

It has been said that a specific legacy must be liable to ademption, and that therefore there could not be a specific legacy of a thing which the testator had not at the date of the will. See *Parrott v. Worsfold*, 1 J. & W. 594.

Legacy may be specific yet not subject to ademption.

But it is now clear that a testator may make a specific gift of a thing of which he contemplates the acquisition, as, for instance, of the stock he may die possessed of. *Fountaine v. Tyler*, 9 Pr. 94; *Stewart v. Denton*, 4 Dougl. 219; 2 Chitty, 456; *Stephenson v. Dowson*, 3 B. 342; *Queen's Coll. v. Sutton*, 12 Sim. 521.

Whether the gift of a sum "invested" in a particular way

Whether a gift of a sum

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"invested"  
in a particular  
way is specific.

is specific or not, depends on the question whether the testator meant the legatee to have the sum however invested, or whether the actual investment is the important part of the description.

Thus, a gift of "the" 7,000*l.* out on mortgage is clearly specific. *Gardner v. Hatton*, 6 Sim. 98.

A bequest of 1,000*l.* described as "now" invested or even only as invested in a certain way is specific. *Harrison v. Jackson*, 7 Ch. D. 339 (where *Le Grice v. Finch*, 3 Mer. 50, is disapproved); *McClellan v. Clark*, 50 L. T. 616; *Re Robe*; *Slade v. Walpole*, 61 L. T. 497; *In re Pratt*; *Pratt v. Pratt*, (1894) 1 Ch. 491; *In re Nottage*; *Jones v. Palmer*, (No. 2) (1895) 2 Ch. 657. See *Sparrow v. Josselyn*, 16 B. 135.

A gift of 3,000*l.* "invested in Indian security" has upon the general language of the will been held to be demonstrative. *Mytton v. Mytton*, 19 Eq. 30; see *Beran v. A.-G.*, 4 Giff. 361; 2 N. R. 52; *McClellan v. Clark*, *supra*; *In re Pratt*; *Pratt v. Pratt*, *supra*.

But if the gift is of 300*l.*, or *thereabouts*, invested by the testatrix in a certain way, the words "or thereabouts" show that the investment is the important part of the gift. *Kermode v. Macdonald*, L. R. 1 Eq. 457; *ib.* 3 Ch. 584.

The following gifts have been held to be specific:—

Examples of  
specific gifts.

A gift of a particular debt, or of the money due on a particular security; as, for instance, of "my mortgage," or "the money now owing to me from A." *Innes v. Johnson*, 4 Ves. 568; *Sidebotham v. Watson*, 11 Ha. 170; *Ellis v. Walker*, Amb. 309; *Smallman v. Goolden*, 1 Cox, 329; *Gardner v. Hatton*, 6 Sim. 98; *Re Bridle*, 4 C. P. D. 336; see *Sidney v. Sidney*, 17 Eq. 65.

A gift of the interest of money on a particular security. *Ashburner v. Macquire*, 2 B. C. C. 108.

A gift of a sum of money "which" is secured in a particular way. *Chaworth v. Beech*, 4 Ves. 556; *Gillaume v. Adderley*, 15 Ves. 384; *Davies v. Morgan*, 1 B. 405.

A gift of money described as "being" on a particular security. *Nelson v. Carter*, 5 Sim. 530; *Ford v. Fleming*, 2 P. W. 469; 1 Eq. Ca. Ab. 302, pl. 3. See *Sparrow v. Josselyn*, 16 B. 135; *Smith v. Pybus*, 9 Ves. 566.

A legacy directed to be paid out of the amount of a debt due to the testator is a demonstrative legacy. *Vickers v. Pound*, 6 W. R. 580; 4 Jur. N. S. 543; 6 H. L. 885. Chap. XV.

Upon the question whether legacies given in supposed exercise of a power which the testator cannot exercise are specific, see *Walker v. Laxton*, 1 Y. & J. 557; *Re Young*; *Trye v. Sullivan*, 52 L. T. 754. Legacies in exercise of power.

## LEGACIES CONNECTED WITH LAND.

A devise of lands, whether by specific description or by residuary devise, is specific. *Hensman v. Fryer*, L. R. 3 Ch. 420; *Lancefield v. Iggulden*, 10 Ch. 136. Devise of land is specific whether residuary or not.

A devise of land to be sold and divided among certain persons makes them specific legatees. *Page v. Leapingwell*, 18 Ves. 463; *Newbold v. Roadknight*, 1 R. & M. 677. Devise on trust to sell and divide.

The gift of a rent-charge or annuity to be paid out of land with powers of distress is specific. *Long v. Short*, 1 P. W. 403; *Davenhill v. Fletcher*, Amb. 244; *Creed v. Creed*, 11 Cl. & F. 491; *Patching v. Barnett*, 51 L. J. Ch. 74. See *Poole v. Heron*, 42 L. J. Ch. 348. Gift of rent-charge.

But a mere gift of an annual sum or of a legacy to be paid out of real estate, will not be specific. *Mann v. Copland*, 2 Mad. 223; *Fowler v. Willoughby*, 2 S. & St. 354; *Colrile v. Middleton*, 3 B. 570. Of annual sum to be paid out of land.

Nor will a gift of a legacy or an annuity with a mere charge on land be specific. *Wilcox v. Rhodes*, 2 Russ. 452; *Davies v. Ashford*, 15 Sim. 42; *Paget v. Huish*, 1 H. & M. 663. Legacy with mere charge on land.

But a trust to raise a sum of money out of land, which sum is then given, is a specific legacy. *Welby v. Rockcliffe*, 1 R. & M. 571; *Dickin v. Edwards*, 4 Ha. 273. Trust to raise a sum out of land.

So, too, a direction to pay a sum out of land, the only gift being in the direction to pay, is specific. *Spurway v. Glyn*, 9 Ves. 483.

In such a case the fact that the personalty is given after payment of legacies will not make the gift of a sum out of the proceeds of sale of realty demonstrative. *Ricketts v. Ladley*, 3 Russ. 418. Effect of directions in the will on legacies in themselves specific.

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A general direction to pay the legacies "hereinafter" given may make a legacy to be paid out of the proceeds of sale of real estate demonstrative. *Hodges v. Grant*, 4 Eq. 140; see *Fream v. Dowling*, 20 B. 624; 4 Eq. 145, n.

And where a legacy was given out of a fund which was not available till the death of A, but there was a direction that it was to be paid with the other legacies, it was held demonstrative. *Williams v. Hughes*, 24 B. 474.

## WHETHER A GIFT IS SPECIFIC OR RESIDUARY.

Whether a gift is specific or residuary.

A gift of the whole of the testator's personal estate may be specific. *Powell v. Riley*, 12 Eq. 175; *Roffey v. Early*, 42 L. J. Ch. 472. And the fact that the testator provides another fund for payment of debts affords a strong argument that the personal estate was intended to be specifically given. See the cases cited under the head of Exoneration of Personalty.

But where a testator, after directing his executors to pay his debts, and giving legacies, gave all his personal estate to A, with certain exceptions, and gave the residue of his estate to his executors on certain trusts, the gift of the personalty was held not to be specific. *Robertson v. Broadbent*, 8 App. C. 812.

Enumeration of specific things.

A mere enumeration of specific things in a residuary bequest will not make the gift of those things specific. *Taylor v. Taylor*, 6 Sim. 246; *Sutherland v. Cooke*, 1 Coll. 498; *Fielding v. Preston*, 1 De G. & J. 438; *Fairer v. Park*, 3 Ch. D. 309; *In re Green*; *Baldock v. Green*, 40 Ch. D. 610.

A direction that certain funds are in certain events to fall into the residue will not make the gift of those funds specific. *In re Lyne's Estate*, 8 Eq. 482.

A gift of residue including certain specified property will not make the gift of that property specific. *In re Tootal's Estate*, 2 Ch. D. 628; *Macdonald v. Irvine*, 8 Ch. D. 101.

Effect of words "together with," "as well as," &c.

If it can be gathered that the principal object of the testator is to give the specific things, and the residue is thrown in; if, for instance, the residue is added by such words as "together with," or "as well as," the gift of the specific things is specific.

*Hill v. Hill*, 11 Jur. N. S. 806; *Langdale v. Esmonde*, I. R. Chap. XV.  
4 Eq. 576; see *Clarke v. Butler*, 1 Mer. 304.

Possibly if the enumeration of specific things comes after the gift of the residue, the same result may follow. *Bethune v. Kennedy*, 1 M. & Cr. 114; *Mills v. Brown*, 21 B. 1.

The subject of residuary gifts will be found discussed in Chapter XIX.

#### GIFTS OF ALIQUOT PARTS OF A FUND.

If a testator, purporting to dispose of a specific fund of 3,000*l.*, gives one-third to A, one-third to B, and one-third to C, each legacy is specific, and each legatee takes a third, whatever the fund may turn out to be, whether more or less than 3,000*l.* Gift of fund in aliquot parts.

Where the gift is not in form in aliquot parts, it may appear that that is in effect the intention. See *Chambers v. Chambers*, Mos. 333, commented on in *Booth v. Alington*, 6 D. M. & G. 613; and *Cordell v. Noden*, 2 Vern. 148, commented on in *Smith v. Fitzgerald*, 3 V. & B. 2.

If the fund is stated by the testator to be 3,000*l.*, and he gives 1,000*l.* to each of three legatees, this is in effect the same as if he had given it in aliquot parts. If the fund is deficient, the legatees abate rateably; and if the gift of one of the sums fails, the failure does not enure for the benefit of the legatees of the other sums. *Page v. Leapingwell*, 18 Ves. 463; *Hazlewood v. Green*, 28 B. 1; *In re Jeaffreson's Trusts*, L. R. 2 Eq. 276; *Walpole v. Apthorp*, 4 Eq. 37; see *In re Cruddas*; *Cruddas v. Smith*, (1900) 1 Ch. 730. Division of fund in specific sums.

If the fund is one over which the testator has a power of appointment, the case, as regards the last point, appears to be different. If the testator over-estimates the fund and appoints it in specific sums, and the appointment of one of such sums fails, the failure enures for the benefit of the other legatees so far as necessary to make up the sums appointed to them. *Eales v. Drake*, 1 Ch. D. 217. Effect of lapse of appointed sums.

Where the sum last given out of a specific fund is given as the surplus or residue of the fund, a contest has frequently When gift of residue of specific fund specific.

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arisen whether the so-called surplus is not in effect a gift of the specific sum remaining.

If the sum last given is stated in figures but is also described as the residue of the fund, or the residue of the fund is given and the amount is then stated in figures, this is a specific gift. *Hazlewood v. Green*, 28 B. 1; *In re Jeaffreson's Trusts*, L. R. 2 Eq. 276; *Walpole v. Aphthorp*, 4 Eq. 37.

And the authorities appear to establish that, when the testator shows that he is dealing with a fund of a specific amount, and gives a sum to A, a sum to B, and the residue to C, and there is no contrary intention, the residue is as specific as the named sums. *Page v. Leapingwell*, 18 Ves. 463; *Ex parte Chadwin*, 3 Sw. 380; *Easum v. Applesford*, 5 M. & C. 56; *Wright v. Weston*, 26 B. 429; *Elwes v. Causton*, 30 B. 554; *Walpole v. Aphthorp*, 4 Eq. 37; *Baker v. Farmer*, 3 Ch. 537, p. 540; see *Miller v. Huddleston*, 6 Eq. 65.

Testator not  
dealing with a  
fund of  
definite  
amount.

To make the gift of the residue specific it must appear that the testator is dealing with a fund which he conceives to be of a certain amount, otherwise there is no ground for saying that the residue is specific. *Falkner v. Butler*, Amb. 514; *Petre v. Petre*, 14 B. 197; *Virian v. Mortlock*, 21 B. 252; *De Lisle v. Hodges*, 17 Eq. 441.

If debts are directed to be paid out of the fund, or if the residue has to bear payments which must be of uncertain amount, the residue is not specific. *Harley v. Moon*, 1 Dr. & S. 623; *In re Currie*; *Bjorkman v. Kimberley*, 36 W. R. 752.

And if the fund being stock, the testator makes gifts partly of stock and partly of money, a gift of the residue is not specific. *Carter v. Taggart*, 16 Sim. 423.

In *In re Harries' Trust*, Jo. 199, where the fund was policy monies, the appointment of definite sums exhausted the amount insured and the residue could only carry bonuses of uncertain amount, the residue was, therefore, not specific. See, too, *Corballis v. Corballis*, 9 L. R. Ir. 309.

There may, of course, be special circumstances or indications of intention which will make the gift of the residue of a specific fund specific. *Lakin v. Lakin*, 13 W. R. 704; *Re Bringloe's Trusts*, 26 L. T. 58; *Fee v. McManus*, 15 L. R. Ir. 31.



A gift of a sum of 30,000*l.*, "part of" 120,000*l.*, is a gift of 30,000*l.*, though the fund may turn out less than 120,000*l.* *Booth v. Alington*, 6 D. M. & G. 613. Chap. XV.  
Gift of sum  
part of larger  
sum.

Where a testator is dealing with a specific fund of uncertain amount and directs legacies to be paid out of it, the legacies are not aliquot parts of the fund. They must abate rateably if the fund is insufficient to pay them. On the other hand, if the fund is more than sufficient to pay them, they do not share in the increase. Lastly, if one of the legacies fails by lapse, the lapse does not benefit the residuary legatee until the other legacies have been paid in full. *In re Tunno; Raikes v. Raikes*, 45 Ch. D. 66. Effect of gifts  
out of  
uncertain  
amount.

## CHAPTER XVI.

## CUMULATIVE AND SUBSTITUTIONAL LEGACIES.

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Legacies by  
same instru-  
ment of equal  
amount;

I. LEGACIES of equal amount given by the same instrument are merely repetitions. *Holford v. Wood*, 4 Ves. 75; *Manning v. Thesiger*, 3 M. & K. 29; *Brine v. Ferrier*, 7 Sim. 549; *Early v. Benbow*, 2 Coll. 342; *Early v. Middleton*, 14 B. 453.

But there may be an intention to give both. *Barkenshaw v. Hodge*, 22 W. R. 484, where the gift was to trustees, and the legacies were introduced by the words "upon trust to pay," and "upon further trust to pay," &c.

Parol evidence would be admissible to show that the testator meant the legatee to have both legacies, such evidence being in support of the *primâ facie* meaning of the instrument. See *Hurst v. Beach*, 5 Mad. 351; *Hall v. Hill*, 1 Dr. & War. 94.

of unequal  
amount.

If the legacies are not equal the legatee is entitled to both. *Yockney v. Hansard*, 3 Ha. 622; *Curry v. Pile*, 2 B. C. C. 225; *Baylee v. Quin*, 2 Dr. & War. 116; *Adnam v. Cole*, 6 B. 353.

The rules with regard to cumulative legacies do not apply to the case of a pecuniary gift and a residue given to the same person. In such a case the legatee is entitled to both. *Kirkpatrick v. Bedford*, 4 App. C. 96.

Legacies by  
different  
instruments.

II. Legacies of equal, less, or greater amount, given by different instruments, as by will and codicil, to the same person, are *primâ facie* cumulative. *Hooley v. Hatton*, 1 B. C. C. 390, n.; *Lee v. Pain*, 4 Ha. 201, 216; *Roch v. Callen*, 6 Ha. 531; *Cresswell v. Cresswell*, 6 Eq. 69; *Wilson v. O'Leary*, 12 Eq. 525; 7 Ch. 448; *Walsh v. Walsh*, 1 R. 4 Eq. 396; *In re Armstrong*; *Mayne v. Woodward*, 81 L. R. Ir. 154.

Bequests of a share of residue by will and of a pecuniary legacy by a codicil are, of course, cumulative. *Gordon v. Anderson*, 4 Jur. N. S. 1097; *Ledger v. Hooker*, 18 Jur. 481. Chap. XVI.

It makes no difference that the codicil recites the gift by will. *Guy v. Sharp*, 1 M. & K. 589.

The fact that some legacies in the codicil are expressed to be in addition affords an argument that the others are substitutional, but is not conclusive. *Hooley v. Hatton*, 1 B. C. C. 390, n.; *Allen v. Callow*, 3 Ves. 289; *Mackenzie v. Mackenzie*, 2 Russ. 272; *Wray v. Field*, 2 Russ. 257; 6 Mad. 300; *Barclay v. Wainwright*, 3 Ves. 462.

The fact that a legacy given by a codicil is expressed to be in addition to a legacy given by the will does not show that it is not also in addition to a legacy by a prior codicil. *Spire v. Smith*, 1 B. 419; *Watson v. Reed*, 5 Sim. 431; see *Sawrey v. Rumney*, 5 De G. & S. 698.

III. It may, however, appear that the gift by the later instrument is intended to be substitutional. This may be shown:—

Legacies by different instruments will be substitutional—

1. By the form of the second instrument.

a. If the instrument by which the second gift is made is not a codicil, but is described as a last will and testament, the presumption is strong that it was intended to be in substitution so far as it goes for the prior instrument. *Jackson v. Jackson*, 2 Cox, 95; *Kidd v. North*, 14 Sim. 463; 2 Ph. 91; *Tuckey v. Henderson*, 33 B. 174. if the instruments themselves are substitutional,

b. If the additional instrument recites that the testator has not time to alter his will, legacies given by it will be substitutional. *Russell v. Dickson*, 4 H. L. 293.

c. If the additional instrument is treated as explanatory of and to be incorporated into the will, the case may be brought within the rule as to additional gifts in the same instrument. *Duke of St. Albans v. Beauchlerk*, 2 Atk. 636; *Fraser v. Byng*, 1 R. & M. 90.

And in the same way several testamentary papers may be so connected together as to be in fact one instrument. *Brine v. Ferrier*, 7 Sim. 549.

The same will be the case where there is a gift to a person

Chap. XVI. with a different gift written in the margin of the will. *Martin v. Drinkwater*, 2 B. 215.

or mere repetitions of each other,

2. By the contents of the second instrument.

For instance, where the second instrument is not a codicil but a testamentary paper, and in effect makes the same dispositions as a prior testamentary paper. *Gillespie v. Alexander*, 2 S. & St. 145; *A.-G. v. Harley*, 4 Mad. 263; *Hemming v. Gurney*, 2 S. & St. 311; 1 Bl. N. S. 479.

So one codicil may appear to be a mere repetition of another. If, for instance, both are of the same date and contain the same provisions in all respects. *Whyte v. Whyte*, 17 Eq. 50.

So if, though not of the same date, the legatees are the same, and certain specific legacies, as well as the residue, are given by both. *Duke of St. Albans v. Beauclerk*, 2 Atk. 636; see *Coote v. Boyd*, 2 B. C. C. 521; *Campbell v. Earl of Radnor*, 1 B. C. C. 271; *Roxburgh v. Fuller*, 13 W. R. 39.

Evidence is admissible to show that two codicils of different dates, but containing the same dispositions, were executed only as duplicates. *Hubbard v. Alexander*, 3 Ch. D. 738.

if the terms of the second gift show that it was meant to be substitutional.

3. By the character of the second gift itself:—

a. If the second gift only adapts the bounty to circumstances that have happened; as, for instance, the death of prior legatees. *Barclay v. Wainwright*, 3 Ves. 462; *Allen v. Callow*, 3 Ves. 289; *Osborne v. Duke of Leeds*, 5 Ves. 369.

b. If the second gift can be looked upon as explanatory of the prior gift. *Moggridge v. Thackwell*, 1 Ves. Jun. 479.

c. If by a codicil the testator revokes a portion of a prior gift, and then repeats the rest, so that the repetition may be explained as *ex abundanti cautela*. *Benyon v. Benyon*, 17 Ves. 34; *Hinchcliffe v. Hinchcliffe*, 2 Dr. & S. 96.

d. If the second gift is coupled with a gift of some specific thing already given, this shows it to be substitutional. *Currie v. Pye*, 17 Ves. 462; see *Lord Mayor of London v. Russell*, Finch, 290; explained 6 Ir. Ch. 131.

e. And generally it seems that the difference in the way in which the two gifts are given is in favour of their being cumulative. *Hodges v. Peacock*, 3 Ves. 735; *Lee v. Pain*, 4 Ha. 201.

Though, on the other hand, if the two gifts are of the same amount, but given to different trustees, the argument is the other way. *Benyon v. Benyon*, 17 Ves. 34.

Chap. XVI.

*f.* The testator may show by a reference to a gift in one codicil as a sufficient provision that the gift so given was all the legatee was intended to have. *Robley v. Robley*, 2 B. 95.

*g.* The presumption that two legacies given by two codicils are cumulative is rebutted by the fact that both are expressed to be in substitution for a legacy given by the will. *In re Armstrong; Mayne v. Woodward*, 31 L. R. Ir. 154.

IV. Gifts by different instruments of the same amount and expressed to be given from the same motive are substitutional. *Benyon v. Benyon*, 17 Ves. 34.

Gifts of the same amount given from the same motive are substitutional.

It must, however, be clear that the testator is expressing a motive and not merely giving a description; thus, in the case of gifts of equal amount to a "servant," the term servant is merely descriptive. *Roch v. Callen*, 6 Ha. 531; *Suisse v. Lowther*, 2 Ha. 424; *Wilson v. O'Leary*, 12 Eq. 522; 7 Ch. 448.

If, however, the gifts are not of the same amount they are cumulative. *Hurst v. Beach*, 5 Mad. 352.

V. As a rule substituted or additional legacies are subject to the same conditions as the original legacies, for instance, as regards freedom from legacy duty (*a*); the property on which they are charged or the fund out of which they are payable (*b*); time of payment (*c*); separate use (*d*); gift over to the legatee's estate if he dies before the testator (*e*); and other special conditions (*f*). *Earl of Shaftesbury v. Duke of Marlborough*, 7 Sim. 237; *Cooper v. Day*, 3 Mer. 154; *Fisher v. Brierley*, 30 B. 267 (*a*); *Leacroft v. Maynard*, 1 Ves. Jun. 279; 3 B. C. C. 233; *Crowder v. Clowes*, 2 Ves. Jun. 449; *Bristow v. Bristow*, 5 B. 289 (*b*); *Giesler v. Jones*, 25 B. 418 (*c*); *Day v. Croft*, 4 B. 561 (*d*); *In re Wight*; *Knowles v. Sadler*, W. N. 1879, 20 (*e*); *Duncan v. Duncan*, 27 B. 392; *Boddington v. Clairat*, 25 Ch. D. 685; *In re Benyon; Benyon v. Grieve*, 51 L. T. 116; 32 W. R. 871 (*f*).

Additional and substituted gifts subject to conditions of original gifts.

It makes no difference that the legacy is not expressed to be in addition to the previous gift (*a*), or that the substituted

**Chap. XVI.** legacy is in part payable out of a different fund (b). *Johnson v. Lord Harrowby*, Johns. 425 ; 1 D. F. & J. 188 (a) ; *Re Colyer* ; *Millikin v. Snelling*, 55 L. T. 844 (b).

The rule does not apply where a legacy is given to a person in lieu of a legacy to another legatee who has pre-deceased the testator. *Chatteris v. Young*, 2 Russ. 184.

Nor does it apply where the condition in question is limited by the will to legacies "hereinafter" given, and the additional legacy is given by a codicil. *Bonner v. Bonner*, 13 Ves. 379 ; *Strong v. Ingram*, 6 Sim. 197.

It is not quite clear whether an additional or substitutional gift will be subject to the same executory gifts over as the original gift ; it seems, however, that it will not. *Crowder v. Clowes*, 2 Ves. Jun. 449 ; *Alexander v. Alexander*, 5 B. 518 ; see *Donnellan v. O'Neill*, I. R. 5 Eq. 523.

An additional legacy given in terms which would give an absolute interest is not subject to limitations of the prior gift, which would cut it down to a life interest. *Haley v. Bannister*, 23 B. 336 ; *Mores' Trust*, 10 Ha. 171 ; *Mann v. Fuller*, Kay, 624 ; *Hill v. Jones*, 37 L. J. Ch. 465 ; see *Cookson v. Hancock*, 2 M. & Cr. 606 ; *Hargreaves v. Pennington*, 12 W. R. 1047.

## CHAPTER XVII.

## THE INCIDENTS ATTACHING TO SPECIFIC AND GENERAL LEGACIES.

## I. ADEEMPTION.

A SPECIFIC gift is adeemed if at the testatator's death the subject-matter of the gift has been destroyed by the act of God or converted into something else by the act of the testator or by duly constituted authority. Chap. XVII.  
Ademption of specific legacy.

If the gift is adeemed a charge imposed upon it is also adeemed. *Cowper v. Mantell*, 22 B. 223. Ademption destroys charge.

Thus a gift of chattels is adeemed if they are lost at sea with the testator. *Durrant v. Friend*, 5 De G. & S. 343. Ademption by loss at sea,

So a devise of advowsons is adeemed by an Act of Parliament abolishing the advowsons and giving compensation to the owners. *Frewen v. Frewen*, 10 Ch. 610. by Act of Parliament.

A specific devise of land is adeemed if it is afterwards sold, though the purchase-money may be impressed with a trust for reinvestment in land. *In re Bagot's Settlement*, 31 L. J. Ch. 772. Specific devise adeemed by sale.

If a particular security is given and the testator sells it or converts it into something substantially different, for instance, from debentures of a company into debenture stock of the same company, the gift is adeemed. *Humphreys v. Humphreys*, 2 Cox, 184; *Harrison v. Jackson*, 7 Ch. D. 389; *Macdonald v. Irvine*, 8 Ch. D. 101; *In re Lane*; *Luard v. Lane*, 14 Ch. D. 856; *Manton v. Tabois*, 30 Ch. D. 92. Sale or conversion of security given.

A contract for sale entered into after the date of the will and binding on the testator at his death though not completed till Contract for sale.

**Chap. XVII.** afterwards is sufficient to cause ademption. *Watts v. Watts*, 17 Eq. 219.

Rights of  
specific donee  
as to rents till  
completion.

In such a case the specific legatee is entitled to enjoy the property and to take the rents and profits until the time for completion of the sale arrives, or if no time is fixed for completion until the time when the sale ought reasonably to be completed. *Townley v. Bedwell*, 14 Ves. 591; *Watts v. Watts*, *supra*.

Contract not  
binding.

An offer not accepted at the death or a contract not enforceable against the testator or rescinded by the purchaser on the ground that the testator has no title will not cause ademption. *In re Pearce*; *Roberts v. Stephens*, 8 R. 805; *Crowe v. Menton*, 28 L. R. Ir. 519; *In re Thomas*; *Thomas v. Howell*, 34 Ch. D. 166. See the Chapter on Conversion.

Option to  
purchase.

In some cases specific property has been given which was subject to a lease containing an option of purchase. In such cases, if the property is specifically given after the option has been created, the specific donee takes the property or the proceeds of sale, if the option is exercised after the testator's death. *Drant v. Vause*, 1 Y. & C. C. 580; *Emuss v. Smith*, 2 De G. & S. 722; *In re Pyle*; *Pyle v. Pyle*, (1895) 1 Ch. 724; *Duffield v. McMaster*, (1896) 1 Ir. 370; see *In re Isaacs*; *Isaacs v. Reginald*, (1894) 3 Ch. 506.

But if the testator creates the option after the date of his will its exercise after his death adeems the gift. *Weeding v. Weeding*, 1 J. & H. 424.

The case of a gift of a lease with provisions for compensation if the lease is determined is different. In such a case the legatee is entitled to the compensation. *Coyne v. Coyne*, 1 R. 10 Eq. 496.

Transfer of  
security to  
testator.

Mere transfer of a security from trustees to the testator or from the testator into Court under an order in lunacy, though the gift is of a security described as in the testator's name, will not cause ademption. *Dingwell v. Askew*, 1 Cox, 427; *Clough v. Clough*, 3 M. & K. 296; *Jones v. Southall*, 32 B. 31; *In re Wood*; *Anderson v. London City Mission*, (1894) 2 Ch. 577; *Re Vickers*; *Vickers v. Mellor*, 81 L. T. 719.

And a request from the testator to his agents to sell not



acted upon till after the testator's death does not cause  
 ademtion. *Harrison v. Asher*, 2 De G. & S. 436. Chap. XVII.

Nor will an alteration which leaves the thing substantially  
 the same. Thus, conversion by the company of its shares  
 into stock does not cause ademtion. *Oakes v. Oakes*, 9 Ha.  
 666, 672; see *Partridge v. Partridge*, Ca. t. Talb. 226 (con-  
 version of South Sea Stock into annuities by Act of Parlia-  
 ment); *Re Pilkington's Trusts*, 6 N. R. 246 (conversion of  
 bonds into shares); *Longfield v. Bantry*, 15 L. R. Ir. 101. Slight  
alteration.

As to the effect of the National Debt Conversion Act, 1888  
 (51 & 52 Vict. c. 2), upon specific gifts of 3 per cent. Annuities,  
 see *Duke of Northumberland v. Percy*, (1893) 1 Ch. 298; *In re*  
*Howell-Shepherd*; *Churchill v. St. George's Hospital*, (1894)  
 3 Ch. 649.

Where the donee of a general power appoints a fund of  
 personalty by a specific description the appointment is not  
 adeemed by a subsequent change of investment. *In re John-*  
*stone's Settlement*, 14 Ch. D. 162; *Willett v. Finlay*, 29 L. R.  
 Ir. 156, 497. Property  
subject to  
power.

On the other hand, an appointment of land under a general  
 power in a settlement is adeemed if the land is afterwards sold  
 under a power of sale exercisable with the testator's consent.  
*Gale v. Gale*, 21 B. 349; *Blake v. Blake*, 15 Ch. D. 481.

On the same principle, if the testator makes a specific gift of  
 a mortgage or other debt owing to him and the debtor after-  
 wards pays it to the testator, whether voluntarily or under  
 compulsion, the gift is adeemed and a fresh debt subsequently  
 accrued due will not pass. *Ashburner v. Macquive*, 2 B. C. C.  
 108; *Fryer v. Morris*, 9 Ves. 360; *Gardner v. Hatton*, 6 Sim.  
 98; *Makeown v. Ardagh*, 1 R. 10 Eq. 445; *Aston v. Wood*,  
 43 L. J. Ch. 715; *In re Bridle*, 4 C. P. D. 336; see *Sidney v.*  
*Sidney*, 17 Eq. 65. Ademption of  
gift of mort-  
gage or debt.

If the thing specifically given is converted by lawful  
 authority, such as an order in lunacy, the gift is gone.  
*Jones v. Green*, 5 Eq. 555; *In re Freer*; *Freer v. Freer*, 22  
 Ch. D. 622; see *A.-G. v. Marquis of Ailesbury*, 12 App. C. 672. Conversion by  
lawful  
authority.

Having regard to the provisions of sect. 123 of the Lunacy  
 Act, 1890 (53 Vict. c. 5), which is not like sect. 119 of the Effect of  
Lunacy Act,  
1890, s. 123.

Chap. XVII. Lunacy Regulation Act (16 & 17 Vict. c. 70), limited to land, it is probable that a sale under an order in lunacy would not adeem a specific legacy so far as the proceeds remain unapplied at the lunatic's death.

Unauthorised conversion. There will be no ademption where the specific thing has been converted without authority. *Basan v. Brandon*, 8 Sim. 171; *Taylor v. Taylor*, 10 Ha. 475; *Jenkins v. Jones*, L. R. 2 Eq. 323; see *Browne v. Groombridge*, 4 Mad. 495; *In re Larking*; *Larking v. Larking*, 37 Ch. D. 310.

Gift adeemed though traceable. In cases of ademption it is not material that the property can be traced or that it has been kept apart from the rest of the testator's property. Cases *supra*; *In re Bridle*, 4 C. P. D. 336.

Effect of republication by codicil. Where a specific gift has been adeemed by conversion into something else, a codicil republishing the will will not have the effect of passing to the legatee the thing into which the subject-matter of the specific gift has been converted. *Drinkwater v. Falconer*, 2 Ves. Sen. 626; *Monck v. Monck*, 1 Ba. & Be. 306; *Montague v. Montague*, 15 B. 565; *Corper v. Mantell*, 22 B. 223; *Hopwood v. Hopwood*, 7 H. L. 728; *Sidney v. Sidney*, 17 Eq. 65; *Macdonald v. Irvine*, 8 Ch. D. 101.

Intention to give property whatever its condition. The gift may be so worded as to show that the subject-matter was to pass to the legatee whatever its condition might be at the testator's death. This construction has been applied in several cases where the testator disposed of what was coming to him from another estate. In such a case the fact that the testator gets in the property does not destroy the gift if the property can be traced. The case is not one of ademption at all. *Lee v. Lee*, 27 L. J. Ch. 824; *Morgan v. Thomas*, 6 Ch. D. 176; *Re Kenyon's Estate*; *Mann v. Knapp*, 56 L. T. 626; see *Moore v. Moore*, 29 B. 496. The cases of *Le Grice v. Finch*, 3 Mer. 50; *Clark v. Browne*, 2 Sm. & G. 524, may possibly be supported on this ground; but see *Harrison v. Jackson*, 7 Ch. D. 339.

Gift of things in a house when adeemed. Where things in a particular place, such as a house, are given and are afterwards removed to another place, the question is, whether the place is a substantive part of the

bequest or whether it is merely descriptive of the things the testator refers to. Chap. XVII.

In the latter case the removal of the things to another place is immaterial. *Cunningham v. Ross*, 2 Cas. t. Lee, 272; *Norris v. Norris*, 2 Coll. 719; *Blagrove v. Coore*, 27 B. 138; *Norreys v. Franks*, I. R. 9 Eq. 18. Removal is immaterial if the place is merely descriptive.

Similarly, a bequest of furniture in a house will pass furniture intended to be placed there. *Rawlinson v. Rawlinson*, 3 Ch. D. 302; but see *Lord Brooke v. Earl of Warwick*, 2 De G. & S. 425.

If, however, the bequest of the things is connected with the enjoyment of the house, both being given to the legatee; or if the gift is of such furniture as may be in a particular place at the testator's decease, a permanent removal works an ademption. *Colleton v. Garth*, 6 Sim. 19; *Shaftesbury v. Shaftesbury*, 2 Vern. 747; *Heseltine v. Heseltine*, 3 Mad. 276; *Green v. Symonds*, 1 B. C. C. 129, n.; *Spencer v. Spencer*, 21 B. 548. Secus, if the intention is to give only such things as may be in the place.

But a removal for a temporary purpose will not have this effect. *Domvile v. Baker*, 32 B. 604; *Chapman v. Hart*, 1 Ves. Sen. 271; *Norreys v. Franks*, I. R. 9 Eq. 18; *Land v. Deraynes*, 4 B. C. C. 537; *Lord Brooke v. Earl of Warwick*, 2 De G. & S. 425; *In re Johnston*; *Cockerell v. Earl of Essex*, 26 Ch. D. 538. Temporary removal will not adeem.

## II. CHANGE OF INTEREST OF TESTATOR.

A somewhat different question arises where the nature of the testator's interest in the subject-matter of a bequest alters between the date of the will and his death; if, for instance, the testator subsequently acquires the reversion of leaseholds given by his will. Effect of change in the testator's interest after the date of the will.

Before the Wills Act a specific bequest of a lease was adeemed by the acceptance of a new lease or the acquisition of the reversion, unless the testator, being *cestui que trust*, gave his interest in the lease, which includes the right to the benefit of a renewal by the trustee, or expressly gave his future interest. *Carte v. Carte*, 3 Atk. 174; *James v. Dean*, 11 Ves. 383; 15 Ves. 238; *Marwood v. Turner*, 3 P. W. 163; Acceptance of a new lease.

Chap. XVII. *Abney v. Miller*, 2 Atk. 598; *Capel v. Girdler*, 9 Ves. 509; *Slatter v. Noton*, 16 Ves. 197.

In the same way, the purchase of the equity of redemption revoked a devise of the mortgaged estate. *Strode v. Lady Falkland*, 2 Vern. 621; *Yardley v. Holland*, 20 Eq. 428.

And a general gift of lands or a house in which the testator had a chattel interest was *primâ facie* a gift of that interest and subject to ademption in the same way. *Rudstone v. Anderson*, 2 Ves. Sen. 418; *Hone v. Medcraft*, 1 B. C. C. 261; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Colegrave v. Manby*, 6 Mad. 72; 2 Russ. 238.

S. 28 of  
Wills Act.

Sect. 28 of the Wills Act enacts that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

The effect of the section appears to be merely to repeal the old law under which a change of interest in itself revoked a gift and to leave the Court free to construe the will in such a way as to carry out the testator's intention. The section does not make something newly acquired pass under a gift if the language of the gift is not appropriate to pass it. See *Blake v. Blake*, 15 Ch. D. 487.

Thus, where a testator, having a leasehold house, gives his house for all his interest therein, or for all the residue of his term therein, and afterwards acquires the reversion, the fee simple has in several cases been held to pass. The testator's intention in those cases was, that the devisee should have the testator's interest whatever it might be. He intends to describe the property and not merely to limit the gift to the estate he has in it at the date of his will. *Struthers v. Struthers*, 5 W. R. 809; *Miles v. Miles*, L. R. 1 Eq. 462; *Cox v. Bennett*, 6 Eq. 422; *Leckey v. Watson*, 1 R. 7 C. L. 157; *Wedgwood v. Denton*, 12 Eq. 290; *Saxton v. Saxton*,

13 Ch. D. 359 ; see *Emuss v. Smith*, 2 De G. & S. 722 ; which may be upheld on other grounds. Chap. XVII.

On the other hand, a gift of the lease of the house in which the testator should reside at his death will not pass a freehold house subsequently purchased by the testator. *In re Knight; Knight v. Burgess*, 34 Ch. D. 518.

So where the testator, being entitled to a third share of a business, bequeathed his share and interest in the business, and afterwards acquired the whole business, the whole business was held to pass. *In re Russell; Russell v. Chell*, 19 Ch. D. 432. Share of business.

On the other hand, where a testator devises a freehold estate and afterwards sells it and allows part of the purchase-money to remain on mortgage of the estate, the mortgage money does not pass under the devise of the estate. *Moor v. Raisbeck*, 12 Sim. 123 ; *In re Clowes*, (1893) 1 Ch. 214.

### III. RIGHT OF RETAINER.

A pecuniary or residuary legatee who is indebted to the estate cannot claim his legacy or share of residue without paying his debt and the executor may retain so much of the legacy or share as may be required to satisfy the debt. The right of retainer has priority over a mortgagee of the legacy or share. See *In re Weston; Davies v. Tagart*, W. N. (1900) 104. Right of retainer.

But where A is indebted to B's estate, which is indebted to C's estate, under which A takes a legacy, there is no equity to retain the legacy till A pays his debt to B's estate, so as to enable that estate to pay C's estate. *Arison v. Holmes*, 1 J. & H. 530.

The right of retainer extends to a share of proceeds of sale of real estate given to the executors on trust for sale and to a specific gift of money. *Willis v. Greenhill*, 29 B. 376 ; *In re Akerman; Akerman v. Akerman*, (1891) 3 Ch. 212 ; *In re Taylor; Taylor v. Wade*, (1894) 1 Ch. 671.

It does not extend to a specific devise or specific gift of leaseholds or other chattels. *Harvey v. Palmer*, 4 De G. & S. 425 ; *In re Akerman; Akerman v. Akerman*, (1891) 3 Ch. 212. Right of retainer against specific legatee.

The right remains though the debt may be barred by statute. Debt barred by statute.

Chap. XVII. *Courtenay v. Williams*, 3 Ha. 539; affirmed 15 L. J. Ch. 204; *In re Cordwell's Estate*; *White v. Cordwell*, 20 Eq. 644.

Costs of administration directed to be paid by a legatee are within the same rule; and the assignee of a legatee takes subject to the executor's right against the legatee. *In re Knapman's Estate*; *Knapman v. Wreford*, 18 Ch. D. 300; see *In re Hope*; *De Cetto v. Hope*, W. N. (1900) 76.

The principle applies to a beneficiary interested under the will and is not to be extended to a person who has a claim for damages against the estate. Thus, where a debtor to the estate whose debt was statute barred recovered damages against the estate, the executors were not allowed to retain the damages against the debt. *Dingle v. Coppen*, (1899) 1 Ch. 726.

Bankruptcy  
after  
testator's  
death.

If the legatee becomes bankrupt after the testator's death the executor may retain the debt with interest at 4 per cent. The principle applies though the legacy is subject to a life interest and the debt was at the testator's death only a liability to indemnify the estate against payments which the executor might have to make because the testator had become surety for the legatee. *Bousfield v. Lawford*, 1 De J. & S. 459; *In re Whitehouse*; *Whitehouse v. Edwards*, 37 Ch. D. 683; *In re Palmer*; *Palmer v. Clarke*, 13 R. 220; *In re Watson*; *Turner v. Watson*, (1896) 1 Ch. 925.

But the executor cannot retain if he could not prove for the debt in the bankruptcy, for instance, if the debt arises from the liability of the legatee to indemnify the estate against payments made because the testator was his surety and the creditor has proved in the bankruptcy for the whole debt, so that the executor would have no right of proof. *In re Binns*; *Lee v. Binns*, (1896) 2 Ch. 584.

And where a residuary legatee had a right of pre-emption of a house under the will which he exercised and afterwards became bankrupt, and the trustee in bankruptcy disclaimed the contract and the executor did not prove in the bankruptcy under sect. 55 (7) of the Bankruptcy Act, 1883, it was held that the executor could not retain the loss on the sale of the house out of the bankrupt's share of residue. *In re Palmer*; *Palmer v. Clarke*, 13 R. 220.

If the executor proves in the bankruptcy the right of retainer is gone. *Stammers v. Elliott*, 3 Ch. 195; *Armstrong v. Armstrong*, 12 Eq. 614; see *In re Whitehouse*; *Whitehouse v. Edwards*, 37 Ch. D. 688. Chap. XVII.  
Proof in  
bankruptcy.

If the bankrupt obtains his discharge or the executor becomes bound by a composition deed the right of retainer is gone. See *In re Orpen*; *Beswick v. Orpen*, 16 Ch. D. 202; *In re Watson*, (1896) 1 Ch. 925, p. 933.

In the case of a legatee bankrupt at the death of the testator there is no right to retain the debt out of the legacy, since there was never a time at which the same person was entitled to receive the legacy and liable to pay the whole debt. Dividends payable under the bankruptcy, if any have been declared, may be retained. *Cherry v. Boulton*, 2 Kee. 319; 4 M. & Cr. 442; *In re Hodgson*; *Hodgson v. Fox*, 9 Ch. D. 673; *In re Orpen*; *Beswick v. Orpen*, 16 Ch. D. 202; *Re Rees*; *Rees v. Rees*, 60 L. T. 260.

A debt due from the husband of a legatee may be retained out of so much of the legacy as is payable to the husband after the legatee's equity to a settlement is satisfied. *M'Mahon v. Burchell*, 5 Ha. 325; *In re Briant*; *Poulter v. Shackel*, 39 Ch. D. 471. Debt due from  
husband of  
legatee.

Where a married woman assigns her reversionary interest under Sir R. Malins' Act (20 & 21 Vict. c. 57), there is no right as against the assignee to retain a debt due from the husband. *In re Batchelor*; *Sloper v. Oliver*, 16 Eq. 481. Assignment  
under Malins'  
Act.

The right of retainer is gone as soon as the executors have set apart and invested a sum to meet a legacy. *Ballard v. Marsden*, 14 Ch. D. 374.

Cross demands existing in different rights cannot be set off. Thus, a debt due to the executor in his personal capacity cannot be retained out of a legacy. *M'Mahon v. Burchell*, 2 Ph. 127; see *Stammers v. Elliott*, 3 Ch. 195; *Middleton v. Pollock*; *Ex parte Nugee*, 20 Eq. 29. Claims in  
autre droit.

#### IV. EXONERATION OF SPECIFIC LEGACIES.

##### 1. Liabilities created by testator.

A specific legatee has a right to have his specific legacy freed from the debts and liabilities of the testator existing at

Exoneration  
of specific  
legacies from  
debts and

**Chap. XVII.** his decease. *Stewart v. Denton*, 4 Doug. 219; *S. C.* 2 Chit. 456; *Barry v. Harding*, 1 J. & Lat. 489; *Fitzwilliams v. Kelly*, 10 Ha. 266.

liabilities of  
testator.

So if the testator has pledged the legacy, whether for his own debt or not, the legatee is entitled to compensation. *Knight v. Davis*, 3 M. & K. 358; *Bothamley v. Sherson*, 20 Eq. 304.

## 2. Liabilities incidental to the thing.

Land subject  
to lease.

Where land is devised subject to a lease the devisee must bear liabilities under the lease which are in their nature incident to the relation of landlord and tenant, but not liabilities which are preparatory to the establishment of the relation.

For instance, liability at the end of the term to pay for the tenant's property at a valuation must be borne by the devisee. *Mansel v. Norton*, 22 Ch. D. 769.

On the other hand, liability under covenant to lay down land in grass within a year must be borne by the residuary legatees and not by the devisee. *Eccles v. Mills*, (1898) A. C. 360.

Specific gift of  
leaseholds.

In the case of specific legatees of leaseholds the rule is that liabilities existing at the death must be paid out of residue, but those accrued after the death must be borne by the legatee.

Thus liability for rent and fines due at the death and for dilapidations then existing must be paid out of residue, and it seems, if the testator has allowed the property to go out of repair so that there is a risk of forfeiture, the specific legatee is entitled to have it put in repair at the expense of the estate. *Fitzwilliams v. Kelly*, 10 Ha. 266; *In re Courtier*; *Coles v. Courtier*, 34 Ch. D. 136; *Brereton v. Day*, (1895) 1 Ir. 519; *In re Betty*; *Betty v. A.-G.*, (1899) 1 Ch. 821; see *Hickling v. Boyer*, 3 Mac. & G. 635; *Marshall v. Holloway*, 5 Sim. 196.

On the other hand, the specific legatee must bear the ordinary outgoings incident to the property, such as fines and ground rent accrued since the death, and ordinary outgoings and the continuing obligations under the lease. *Fitzwilliams v. Kelly*, *supra*; *Garratt v. Lancefield*, 2 Jur. N. S. 177; *In re Taber*; *Arnold v. Kayess*, 46 L. T. 805; 30 W. R. 883;



51 L. J. Ch. 721; *In re Redding*; *Thompson v. Redding*, **Chap. XVII.** (1897) 1 Ch. 876; *Kingham v. Kingham*, (1897) 1 Ir. 170; *In re Betty*; *Betty v. A.-G.*, (1899) 1 Ch. 821; not following *In re Baring*; *Baring v. Baring*, (1898) 1 Ch. 61; *In re Tomlinson*; *Tomlinson v. Tomlinson*, (1898) 2 Ch. 292.

Where shares are specifically bequeathed calls made before the testator's death are payable out of his estate; calls made after his death must, as between residuary and specific legatee, be borne by the latter. *Armstrong v. Burnet*, 20 B. 424; *Addams v. Ferick*, 26 B. 384; *Day v. Day*, 1 Dr. & S. 261; see *In re Box*, 1 H. & M. 552. The earlier cases, *Blount v. Hopkins*, 7 Sim. 43; *Jacques v. Chambers*, 2 Coll. 435; 4 R. C. 205, 499; *Wright v. Warren*, 4 De G. & S. 367; *Clive v. Clive*, Kay, 600, may be considered overruled.

Where the residue was given to a tenant for life and after his death specific shares were given, calls on the shares made after the testator's death were held payable out of the general residue. *In re Box*, 1 H. & M. 552. But ought they not to have been charged upon the shares. See, too, *Macdonald v. Irvine*, 8 Ch. D. 101 (as to the policy).

#### V. EXONERATION OF MORTGAGED PROPERTY.

In cases not affected by the Real Estate Charges Act, 1854, commonly called Locke King's Act (17 & 18 Vict. c. 113), amended by 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34, the devisee of mortgaged lands, the mortgages upon which had been either created or adopted by the testator, was entitled, in the absence of a contrary intention, to have the mortgage paid off out of the first four classes of property in the administration of assets; and as regards the fourth, viz., real estate charged with debts generally, if the mortgaged lands were themselves included in the general charge of debts, they bore a proportionate part of the mortgage. *Middleton v. Middleton*, 15 B. 450; *Harper v. Munday*, 7 D. M. & G. 369.

Similarly, where mortgaged lands descended, the heir was entitled to exoneration out of the first two classes of property. *Hill v. Bishop of London*, 1 Atk. 621; *Chester v. Powell*, 7 Jur. 389; *Yonge v. Furze*, 20 B. 380.

Calls upon shares.

Exoneration of mortgaged property in cases before Locke King's Act.

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No right  
against specific  
devisee or  
legatee.

The devisee had no right to call upon other specific devisees or legatees to contribute to pay off the mortgage. *O'Neal v. Mead*, 1 P. W. 693; *Hallivell v. Tanner*, 1 R. & M. 633; *In re Butler*; *Le Bas v. Herbert*, (1894) 3 Ch. 250.

Devise of  
mortgaged  
lands subject  
to the mort-  
gage did not  
exonerate the  
personalty.

A devise of lands expressly subject to the mortgage thereon did not exonerate the personalty, the words "subject to the mortgage" being held merely descriptive. *Duke of Ancaster v. Meyer*, 1 B. C. C. 454; *Bickham v. Cruttwell*, 3 M. & Cr. 763.

Direction to  
pay off certain  
mortgage.

A direction that a mortgage on a certain estate was to be paid off did not exonerate the personalty from paying off mortgages on other estates. *In re Bull*; *Catty v. Bull*, 49 L. T. 592.

Nor did a direction that part of the mortgaged land was to bear a larger proportion of the mortgage than another part. *Goodwin v. Lee*, 1 K. & J. 377.

Devise to A,  
he paying the  
mortgage.

Under a devise of land to A, he paying a mortgage thereon with a gift to the sub-mortgagee of a sum smaller than the mortgage debt to exonerate the mortgage, it was held that the devisee was not entitled to have the mortgage paid off out of the personalty beyond the sum given for the purpose. *Lockhart v. Hardy*, 9 B. 379.

Mortgage on  
settled estate.

Where the owner of an estate made a voluntary settlement of the estate, reserving a general power of appointment to himself under which he created a mortgage on the settled estate, with a covenant to pay, it was held that the settled estate was the primary fund for the payment of the mortgage. *Jenkinson v. Harcourt*, Kay, 688.

Locke King's  
Act.

The law on this subject has been altered by Locke King's Act (17 & 18 Vict. c. 113), which enacts that "when any person shall, after the 31st of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to

have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof : Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid or otherwise. Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made, or to be made before the 1st of January, 1855.

The Real Estate Charges Act, 1867 (30 & 31 Vict. c. 69), extends and defines the meaning of the words "contrary or other intention" in the case of testators dying after the 31st of December, 1867, and by sect. 2 declares that in the construction of the principal Act the word mortgage shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator.

By the Real Estate Charges Act, 1877 (40 & 41 Vict. c. 34), it is enacted as follows :—

1. The Acts mentioned in the schedule hereto (17 & 18 Vict. c. 113 ; 30 & 31 Vict. c. 69) shall, as to any testator or intestate dying after the 31st December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money ; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention ; and

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such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate.

2. This Act shall not extend to Scotland.

## WHAT PERSONS ARE WITHIN THE ACTS.

What persons  
are within  
the Acts.

The Crown taking personalty in default of next of kin is within the words "persons claiming through or under the deceased person" in Locke King's Act. *Dacre v. Patrickson*, 1 Dr. & Sm. 186.

The heir taking by descent, owing to lapse or otherwise, from a person dying after the 31st December, 1854, is not entitled to exoneration under the exception in the proviso in the original Act, though the will may be made before the 1st January, 1855. *Power v. Power*, 8 Ir. Ch. 340; *Piper v. Piper*, 1 J. & H. 91; *Nelson v. Page*, 7 Eq. 25.

On the other hand, a devisee taking under a will made before the 1st January, 1855, is within the proviso, though the will may have been republished after that date. *Rolfe v. Perry*, 3 D. J. & S. 481.

The donee of an option to purchase land at a fixed price is not a devisee within the Act. *Given v. Massey*, 31 L. R. Ir. 126.

## WHAT PROPERTY IS WITHIN THE ACTS.

Copyholds.

Copyholds are within Locke King's Act. *Piper v. Piper*, 1 J. & H. 91.

Land on trust  
for sale.

Land devised on trust for sale, and coming to the testator as personalty, is not within that Act. *Lewis v. Lewis*, 13 Eq. 219.

Leaseholds.

Leaseholds are not within the original Act or the Act of 1867. *Soloman v. Soloman*, 12 W. R. 540; 33 L. J. Ch. 473; *Gael or Gall v. Fenwick*, 22 W. R. 211; 43 L. J. Ch. 178; *In re Wormsley's Estate*; *Hill v. Wormsley*, 4 Ch. D. 665.

They are within the Act of 1877. *In re Kershaw*; *Drake v. Kershaw*, 37 Ch. D. 674.

The Act applies where real and personal estate are directed

to be converted, and the proceeds made a mixed fund. *Elliott v. Dearsley*, 16 Ch. D. 322. Chap. XVII.

If the mortgage includes freeholds and leaseholds, the mortgage must be apportioned between the freeholds and leaseholds according to their values at the testator's death, and the amount apportioned in respect of the leaseholds will, in cases not within the Act of 1877, be discharged out of the personal estate or out of the fund appointed for payment of debts. *Gall v. Fenwick*, *supra*.

#### WHAT MORTGAGES ARE WITHIN THE ACTS.

Mortgages by deposit of title deeds, with or without a memorandum of agreement to execute a legal mortgage, are within the Acts. *Pembroke v. Friend*, 1 J. & H. 132; *Davis v. Davis*, 24 W. R. 962. Mortgage by deposit.

So is a deposit of deeds, with a memorandum, though expressed to be only a collateral security. *Coleby v. Coleby*, L. R. 2 Eq. 803.

But a mere general charge by a testator on real estate in aid of his personalty was not within the original Act. *Hepworth v. Hill*, 30 B. 476.

A mortgage to secure the debt of a firm in which the testator is a partner is not within the Acts if the partnership is solvent and able to pay the debt. The debt is the debt of the firm, and the assets out of which the debt is payable are the partnership assets and not the testator's separate estate. *In re Ritson*; *Ritson v. Ritson*, (1899) 1 Ch. 128. Mortgage to secure firm's debt.

A judgment under which the land has been delivered in execution under a writ of *elegit* and a judgment mortgage in Ireland are charges within the Acts. *In re Anthony*; *Anthony v. Anthony*, (1892) 1 Ch. 450; *Nesbett v. Lander*, 17 L. R. Ir. 53. Judgment.

A deed containing a covenant to pay an annuity with a charge on land and powers of distress and entry and a demise to trustees to secure the annuity, creates an equitable charge within the meaning of the Act of 1877. *Re Sharland*; *Kemp v. Rozey*, 74 L. T. 664.

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Lien for  
purchase-  
money.

A lien for unpaid purchase-money on lands purchased by a testator is, by 30 & 31 Vict. c. 69, s. 2, declared to be within the original Act. But that Act mentions only a lien upon lands purchased by a testator, which was construed to mean a person who makes a will, though it may not dispose of the land. It did not extend to the case of an intestate. *Harding v. Harding*, 13 Eq. 493; *Dowdall v. M'Cartan*, 5 L. R. Ir. 313, 642.

The Act of 1877 extends to the lands of an intestate.

Where a testator contracted to buy real estate, and the contract was not completed at his death and was afterwards rescinded, it was held that the devisees of the real estate were entitled to claim against the personalty only the price of the estate less the unpaid purchase-money. *In re Cockcroft*; *Broadbent v. Groves*, 24 Ch. D. 94. See, too, *Day v. Day*, 14 W. R. 261; *In re Kidd*; *Brooman v. Withall*, (1894) 3 Ch. 558.

#### WHAT IS A CONTRARY INTENTION WITHIN THE ACTS.

How contrary  
intention  
ascertained.

The contrary intention is to be ascertained by referring not only to the will, but also to the mortgage and other deeds connected with it. *In re Campbell*; *Campbell v. Campbell*, (1893) 2 Ch. 206.

Direction to  
pay debts.

It was decided that a general direction to pay debts, or to pay debts out of the estate, did not show the contrary intention required by Locke King's Act. *Pembroke v. Friend*, 1 J. & H. 182; *Brownson v. Lawrance*, 6 Eq. 1; *Woolstencroft v. Woolstencroft*, 2 D. F. & J. 347.

Whether the fact that mortgaged lands are devised in strict settlement would make any difference seems doubtful; at any rate it would not where the testator himself contemplates the mortgages as subsisting from generation to generation. *Cootr v. Lowndes*, 10 Eq. 376.

Direction to  
pay debts out  
of the personal  
estate or a  
particular  
fund.

But a direction, that the debts are to be paid out of the personal estate or out of any particular fund, was held to show a contrary intention. *Moore v. Moore*, 1 D. J. & S. 602; *Eno v. Tatham*, 3 D. J. & S. 443; 32 L. J. Ch. 311; *Mellish v.*

*Vallins*, 2 J. & H. 194 ; *Newman v. Wilson*, 31 B. 33 ; *Maxwell v. Hyslop*, L. R. 4 Eq. 407 ; *ib.* 4 H. L. 506. See *Allen v. Allen*, 30 B. 395 ; *Porcher v. Wilson*, 14 W. R. 1011. Chap. XVII.

By 30 & 31 Vict. c. 69, however, it is enacted that in the wills of testators dying after the 31st December, 1867, a declaration that debts are to be paid out of the personal estate is not to be deemed a declaration of intention to exonerate mortgaged lands. The Amendment Act,  
30 & 31 Vict.  
c. 69.

Under this Act, "if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to them ;" per Giffard, V.-C., in *Nelson v. Page*, 7 Eq. 25, p. 28. See *Allen v. Allen*, 30 B. 395 ; *Greated v. Greated*, 26 B. 621.

In cases governed by the Act of 1867, a direction to pay debts out of a mixed fund of realty and personalty, or a direction to pay debts out of the personal estate in exoneration of the real estate, or a charge of debts on certain real estate in aid of the personal estate, and in exoneration of the other real estate, will not entitle the devisee of mortgaged lands to have the mortgage discharged. *Gael or Gall v. Fenwick*, 22 W. R. 211 ; 43 L. J. Ch. 178 ; *In re Rossiter* ; *Rossiter v. Rossiter*, 13 Ch. D. 355 ; *In re Newmarch* ; *Newmarch v. Storr*, 9 Ch. D. 12 ; *Elliott v. Dearsley*, 16 Ch. D. 322 ; and see the Act of 1877, *supra*, p. 151. Direction to  
pay debts.

A direction to pay all debts of every kind, including specialty debts, has been held not to include mortgage debts. *Buckley v. Buckley*, 19 L. R. Ir. 544.

Where a testator charged his trade debts upon his residue, and after the date of his will deposited the title deeds of real estate with his bankers to secure an overdrawn trade account, it was held that the charge showed a contrary intention. *In re Fleck* ; *Colston v. Roberts*, 37 Ch. D. 677. Charge of  
trade debts.

So where a testator charged his property used in trade with his trade debts, and his residue with all other debts, inasmuch as the trade debts included debts secured by mortgage, it was held that other debts charged on the residue also included

**Chap. XVII.** debts secured by mortgage. *In re Nerill*; *Robinson v. Nerill*, 59 L. J. Ch. 511; 62 L. T. 864.

Specific devisee of part of land subject to a mortgage is not entitled to exoneration.

Where part of lands subject to a mortgage is specifically devised, and the rest given to the residuary devisee, or where a life interest is given, and the remainder is given to the residuary devisee, there is no evidence of an intention, that the mortgage is to be borne by the residuary devisee. *Gibbins v. Eyden*, 7 Eq. 371; *Sackville v. Smyth*, 17 Eq. 153; *In re Smith*; *Hannington v. True*, 33 Ch. D. 195; overruling *Brownson v. Lawrance*, 6 Eq. 1.

Direction to pay mortgages out of insufficient fund.

The further question may arise whether, supposing the testator directs the mortgages to be paid out of a specific fund, the devisees will be entitled to exoneration if that fund is insufficient.

It would seem, where the fund is a fund of personalty, the devisees will not be entitled to exoneration beyond the value of the fund. *Rodhouse v. Mold*, 13 W. R. 854; 35 L. J. Ch. 67.

On the other hand, it is laid down by Lord Romilly in *Allen v. Allen*, 30 B. 403, that where a mortgage on Whiteacre is directed to be paid out of Blackacre, the mortgagee is entitled to exoneration out of the personal estate in the first place, as the Act only directs that the mortgaged land shall be primarily liable, and does not alter the ordinary rules of administration where there is an intention that it should not be so liable. But *quere* whether the decision above cited and this dictum are reconcilable; and see *Smith v. Moreton*, 37 L. J. Ch. 6; *Corballis v. Corballis*, 9 L. R. Ir. 309.

How far mortgaged lands applicable in payment of mortgages.

It would seem, that where mortgages are directed to be paid and the personalty is insufficient to pay them, the several lands bear only the mortgages secured upon them, and not a proportionate share of all the mortgages. *Wisden v. Wisden*, 5 Jur. N. S. 455.

#### INCIDENCE OF DEBT AS REGARDS DIFFERENT PROPERTIES MORTGAGED.

Mortgaged estate devised to

Where different portions of an estate subject to a mortgage are devised to different persons, the devisees must contribute



rateably to pay the mortgage according to the value of the portions devised to them. *In re Newmarch* ; *Newmarch v. Storr*, 9 Ch. D. 12.

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different persons.

The same rule applies if the mortgage comprises real and personal property. The devisees of the land and the legatees of the personality contribute rateably. *Trestrail v. Mason*, 7 Ch. D. 655.

Realty and personality mortgaged together.

Where several properties are mortgaged contemporaneously by different deeds, the fact that one of the mortgages is called a collateral security will not throw the mortgage debt primarily on the property comprised in the other mortgage. *Early v. Early*, 16 Ch. D. 214 ; *In re Athill*, 16 Ch. D. 211.

Collateral mortgage.

Where a testator mortgages certain land and then mortgages other land for the same debt and further advances, the whole amount due will, as between the devisees of the different lands, be treated as one debt, and must be borne rateably by the various properties unless it is shown that the land first charged was intended to be the primary security for the amount advanced prior to the second mortgage. *Leonino v. Leonino*, 10 Ch. D. 460, where the cases of *Lipscomb v. Lipscomb*, 7 Eq. 501, and *De Rochefort v. Daves*, 12 Eq. 540, are discussed ; and see *Stringer v. Harper*, 26 B. 38 ; *Evans v. Wyatt*, 31 B. 217.

Successive mortgages.

Where a portion of lands subject to a charge is conveyed by a voluntary deed, containing only a covenant for further assurance, and the rest is devised, the lands conveyed and devised must bear the charge rateably. *Ker v. Ker*, 1. R. 4 Eq. 15.

Shares subject to a general lien of the company for debts due by the shareholder do not contribute rateably with property comprised in a specific security for money borrowed from the company. *In re Dunlop* ; *Dunlop v. Dunlop*, 21 Ch. D. 583.

Locke King's Act and the amending Acts do not affect the doctrine of marshalling ; so that an annuitant whose annuity is charged only on land which is subject to a mortgage may stand in the shoes of the mortgagee as against the personal estate. *Buckley v. Buckley*, 19 L. R. Ir. 544.

Marshalling.

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## VI. RENTS, PROFITS, AND INCOME.

Present devise. 1. A present devise of lands being specific carries the rents and profits from the death of the testator.

Specific bequest. 2. A specific bequest, if vested, carries all the income and profits which may accrue upon it after the testator's death. *Clive v. Clive*, Kay, 600; *Maclaren v. Stainton*, 3 D. F. & J. 202; and see *Carron Company v. Hunter*, L. R. 1 H. L. Sc. 362.

Future devise does not carry the intermediate rents. 3. A future devise of lands, whether the fee is vested in trustees or is in abeyance, does not carry the intermediate rents and profits, which pass either under the residuary clause, if there is one, or to the heir. *Hopkins v. Hopkins*, Ca. t. Talb. 45; 1 Ves. Sen. 268; 1 Atk. 581; *Duffield v. Duffield*, 3 Bl. N. S. 260; *Percival v. Percival*, 9 Eq. 386; *In re Eddels' Trusts*, 11 Eq. 559; see, however, *Best v. Donmall*, 40 L. J. Ch. 160.

The intermediate rents are undisposed of till the actual birth of the devisee. *Richards v. Richards*, Jo. 754; *Mowlem's Trust*, 18 Eq. 9; see *Rawlins v. Rawlins*, 2 Cox, 425; *Goodale v. Gawthorne*, 2 W. R. 680; 2 Sm. & G. 375.

If the devise is to the members of a class who attain twenty-one, the first who attains twenty-one takes the whole of the rents until another member of the class attains twenty-one and so on. *In re Averill*; *Salsbury v. Buckle*, (1898) 1 Ch. 523.

Contingent specific bequests. 4. A contingent specific bequest of chattels real or personalty, where the subject-matter of the gift is not directed to be set apart from the rest of the estate, will not carry the intermediate profits, except perhaps in the case of a person who would be entitled to interest on a general legacy from the testator's death. See *post*, p. 166 *et seq.*; *Holmes v. Prescott*, 12 W. R. 636; 33 L. J. Ch. 264; *Guthrie v. Walrond*, 22 Ch. D. 573; see *Wright v. Warren*, 4 De G. & S. 367.

Property set apart carries income. Where leasehold or other personal property is given to trustees upon certain trusts, or is otherwise directed to be set apart from the rest of the testator's estate it carries the income. *Boddy v. Dawes*, 1 Kee. 362; *Dundas v. Wolfe Murray*,

1 H. & M. 425; *Johnson v. O'Neill*, 3 L. R. Ir. 476; *In re Medlock*; *Ruffle v. Medlock*, 55 L. J. Ch. 788; 54 L. T. 828; *In re Snaith*; *Snaith v. Snaith*, 42 W. R. 468; 71 L. T. 318; *In re Clements*; *Clements v. Pearsall*, (1894) 1 Ch. 665; *In re Woodin*; *Woodin v. Glass*, (1895) 2 Ch. 309, where *Furneaux v. Rucker*, W. N. (1879), 185 is considered.

A fund which has been severed for the benefit of a tenant for life and remainderman carries the interest accruing between the death of the tenant for life and the vesting in the remainderman. *Kidman v. Kidman*, 40 L. J. Ch. 359.

So, too, an appointed fund carries the intermediate interest. *Long v. Orenden*, 16 Ch. D. 691.

To entitle the legatees of a severed fund to interest before the time of payment, the severance must take place by virtue of directions given by the testator with reference to the fund. A fund set aside by the executors, merely because the rest of the estate has become distributable, does not carry interest. *Festing v. Allen*, 5 Ha. 578; *In re Judkin's Trusts*, 25 Ch. D. 743; *In re Inman*; *Inman v. Rolls*, (1898) 3 Ch. 518.

5. A future residuary devise, or a devise subject to prior limitations which may or may not take effect, will not carry intermediate rents and profits. *Hodgson v. Countess of Bective*, 1 H. & M. 376; 12 W. R. 625; 10 H. L. 656; *Wade Gery v. Handley*, 1 Ch. D. 653; 3 Ch. D. 374; overruling *Sidney v. Wilmer*, 4 D. J. & S. 84.

Future  
residuary  
devise.

6. A contingent residuary gift of personalty carries the intermediate interest during the period allowed for accumulation. *Green v. Ekins*, 2 Atk. 473; *Drakeley's Estate*, 19 B. 395; *Countess of Bective v. Hodgson*, 12 W. R. 625; 10 H. L. 656; *Re Lindo*; *Askin v. Ferguson*, 59 L. T. 462.

A future  
residuary  
bequest carries  
the inter-  
mediate  
interest.

The case of *Green v. Tribe*, 27 W. R. 39, appears to be inconsistent with *Countess of Bective v. Hodgson*, unless it can be supported on the ground that the income of residuary personalty bequeathed to a class is undisposed of until a member of the class comes into being.

Chattels real comprised in a residuary gift follow the same rule as personalty proper. *Hodgson v. Countess of Bective*, 1 H. & M. 376; 10 H. L. 656.

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So will a future residuary gift of realty and personalty together.

7. If realty and personalty are blended in a future residuary gift, though the realty may not be directed to be sold, so as to create a mixed fund, intermediate profits will pass. *Genery v. Fitzgerald*, Jac. 468; *Glanvill v. Glanvill*, 2 Mer. 38; *Ackers v. Phipps*, 9 Bl. N. S. 481; 3 Cl. & F. 665; see *In re Townsend's Estate*; *Townsend v. Townsend*, 34 Ch. D. 357.

This rule applies though the realty and personalty are given in separate clauses, if both are intended to go in the same way. *In re Dumble*; *Williams v. Murrell*, 23 Ch. D. 360; *In re Burton's Will*; *Banks v. Heaven*, (1892) 2 Ch. 38.

But the rule does not apply where some of the limitations of the realty and personalty are distinct. *Re Williams*; *Spencer v. Brighthouse*, 54 L. T. 831.

Where real and personal estate were devised on trust to sell and pay the income to A for life, and after his death in trust for his children, and A's life interest was void, and he had no children living, it was held that during A's life, and so long as he had no children, the income was undisposed of. *In re Townsend's Estate*; *Townsend v. Townsend*, 34 Ch. D. 356.

8. Personalty to be laid out in land, or realty to be converted, follows the rules of personalty and realty respectively. *Countess of Bective v. Hodgson*, 10 H. L. 656.

Fund carrying income given to a class.

9. Where there is a gift to a class of a fund, which carries intermediate income, the following further rules apply:—

a. If the members of the class take vested interests at birth, the income is divisible among those members of the class who are for the time being in existence. A member of the class is entitled to income only as from his birth. *Shepherd v. Ingram*, Amb. 448; *Mills v. Norris*, 5 Ves. 335.

b. If the gift is to members of the class who attain twenty-one, a member of the class who has attained twenty-one is entitled to the income upon his share, having regard to the number of members of the class then in existence, but without regard to the possibility of other members of the class being subsequently born. *Hawkins v. Combe*, 1 B. C. C. 335; *Brandon v. Aston*, 2 Y. & C. C. 30; *Mainwaring v. Beever*, 8 Ha. 44; *Rochford v. Hackman*, 9 Ha. 475; *In re*

*Holford*; *Holford v. Holford*, (1894) 3 Ch. 30; *In re Jeffery*; Chap. XVII.  
*Arnold v. Burt*, (1895) 2 Ch. 577.

It follows that if a second member of the class is born during the minority of the first, the whole income until the birth of the second member belongs to the first if he attains twenty-one. If this were not so, difficulties would arise in applying the income for maintenance until the limits of the class are ascertained. See *Mills v. Norris*, 5 Ves. 335; *Scott v. Earl of Scarborough*, 1 B. 154.

But a member of the class who has attained twenty-one, there being other members of the class in existence under twenty-one, is only entitled to the income of his share, having regard to the number of members of the class for the time being in existence. *Brandon v. Aston*, 2 Y. & C. C. 30; *In re Burton's Will*; *Banks v. Heaven*, (1892) 2 Ch. 38; *In re Holford*; *Holford v. Holford*, (1894) 3 Ch. 30; see *In re Jeffery*; *Burt v. Arnold*, (1891) 1 Ch. 671, where the decision was founded upon an erroneous report of *Furneaux v. Rucker*, W. N. 1879, 135; *In re Adams*; *Adams v. Adams*, (1893) 1 Ch. 329.

10. Where there is a gift to the members of a class who attain twenty-one of a fund or property which does not carry the intermediate income, it would seem that the members of the class who have for the time being attained twenty-one are entitled to the whole income, though there may be other members of the class in existence who have not attained twenty-one. *Stone v. Harrison*, 2 Coll. 715; *Furneaux v. Rucker*, W. N. 1879, 135, as explained in *In re Burton's Will*; *Banks v. Heaven*, (1892) 2 Ch. 38, p. 46; and *In re Adams*; *Adams v. Adams*, (1893) 1 Ch. 329, p. 331; see, too, *In re Woodin*; *Woodin v. Glass*, (1895) 2 Ch. 309.

Fund not carrying income given to a class.

## VII. WHAT IS INCOME OF SPECIFIC GIFT—APPORTIONMENT.

The question often arises what are profits accruing after the testator's death.

The profits of a partnership, declared after the testator's death, for a period ending in his lifetime, belong to the testator's estate, and not to the legatee of the testator's

Partnership profits.

Chap. XVII. interest in the business. *Ibbotson v. Elam*, L. R. 1 Eq. 188 ; *Browne v. Collins*, 12 Eq. 586.

On the other hand, the profits of a partnership declared after the testator's death for a period partly before and partly after the death are income, and go to the legatee. *Browne v. Collins*, *supra*. See, too, *Johnston v. Moore*, 27 L. J. Ch. 458.

Debts.

A debt is to be considered as the profits of the year in which it is paid. *Maclaren v. Stainton*, 3 D. F. & J. 202 ; *Edmondson v. Crosthwaite*, 34 B. 30.

A dividend or bonus on shares declared in the testator's lifetime, though not payable until after his death, is capital of the estate. *Wright v. Tuckett*, 1 J. & H. 266 ; *Lock v. Venables*, 27 B. 598 ; *De Gendre v. Kent*, 4 Eq. 282.

And it would seem that a dividend declared after the death for a period expiring before the death is also capital. If the dividend is declared for a period partly before and partly after the death, then if the Apportionment Act applies the dividend would be apportionable, otherwise it is income. *Jones v. Ogle*, 8 Ch. 192 ; *In re Hopkins' Trusts*, 18 Eq. 696.

Dividends on shares.

In some cases dividends on shares declared before the death, but not payable till afterwards, and dividends declared after the death for a period before the death have been held income, but these cases turned upon the special constitution of the companies. *Clive v. Clive*, Kay, 600 ; see 1 J. & H. 266 ; *Bates v. Mackinley*, 31 B. 280.

Apportionment Act.

Since the Apportionment Act (33 & 34 Vict. c. 35) rents, annuities, dividends, and other periodical payments in the nature of income are to be considered as accruing from day to day, and are apportionable where the testator dies between two rent days.

Sect. 5 defines dividends as including all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, whether such payments shall be usually made or declared at any fixed times or otherwise ; but they do not include payments in the nature of a return or reimbursement of capital.

Will before Act.

The Act has been held to apply to a will executed before and confirmed by a codicil executed after the passing of the

Act. *Hasluck v. Pedley*, 19 Eq. 271; *Constable v. Constable*, 48 L. J. Ch. 621; see *Roseingrave v. Burke*, I. R. 7 Eq. 187. Chap. XVII.

It has also been held to apply to the will of a testator dying before the Act came into operation. *In re Cline's Estate*, 18 Eq. 213; *Patching v. Barnett*, 28 W. R. 886; *Lawrence v. Lawrence*, 26 Ch. D. 795; see *Jones v. Ogle*, 8 Ch. 192.

The Act applies to specific as well as to residuary devises. *Capron v. Capron*, 17 Eq. 288; *Pollock v. Pollock*, 18 Eq. 329, overruling *Whitehead v. Whitehead*, 16 Eq. 528; see *A.-G. v. Daly*, I. R. 8 Eq. 595.

A private trading partnership, and a business belonging to the testator, are not within the Act. *Jones v. Ogle*, 8 Ch. 192; *In re Cox's Trusts*, 9 Ch. D. 159. Profits of private partnership.

A limited company is a public company within the Act. *In re Lysaght*; *Lysaght v. Lysaght*, (1898) 1 Ch. 115.

And an insurance company not incorporated but authorised by special Act, to sue and be sued has been held to be a public company within the Act. *In re Griffith*; *Carr v. Griffith*, 12 Ch. D. 655.

Bonuses or surplus profits distributed among the shareholders of a public company once in five years are apportionable under the Act. *In re Griffith*, *supra*.

In determining what is *corpus* and what interest, the Apportionment Act applies as well between tenant for life and remainderman as where in certain events an absolute interest is cut down to a life interest. *Clive v. Clive*, 7 Ch. 443.

The Act does not apply where a testator directs interest to be paid on a legacy till it is appropriated, and the executors purchase stock on which five months' interest has accrued. In such a case the tenant for life is entitled to interest up to the date of the investment and to the whole dividend. *In re Clarke*; *Barker v. Perowne*, 18 Ch. D. 160. Purchase of stock cum dividend.

The Act does not apply to rent payable in advance. *Ellis v. Rowbotham*, (1900) 1 Q. B. 740. Rent payable in advance.

The Act does not extend to any case in which it is expressly stipulated that no apportionment shall take place (see sect. 7). It does not, therefore, apply if there is a direction that every share given by the will shall carry the dividend accruing

**Chap. XVII.** thereon at the testator's death (a); or if the gift is of the whole of the income derived under a particular deed (b). *In re Lysaght, supra* (a); *Re Meredith*; *Stone v. Meredith*, 78 L. T. 492 (b).

#### VIII. INTEREST ON GENERAL LEGACIES.

Conveyancing  
Act, 1881.

Sect. 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), provides that "where any property is held by trustees in trust for an infant either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not."

Effect of  
44 & 45 Vict.  
c. 41, s. 43.

Sect. 43 of the Conveyancing Act does not make a legacy to an infant at a future time carry interest.

The income therefore cannot be applied in maintenance, unless the legacy carries interest. *In re Judkin's Trusts*, 25 Ch. D. 743; *In re Dickson*; *Hill v. Grant*, 28 Ch. D. 291; 29 Ch. D. 331, following the similar decisions under Lord Cranworth's Act (23 & 24 Vict. c. 145), sect. 26; *In re Cotton*, 1 Ch. D. 232; *In re George*, 5 Ch. D. 837.

Interest given  
to a legatee  
vests abso-  
lutely as it  
accrues.

Where a legacy is contingent or payable at a future time, and interest is given in the meantime, or the income is given for maintenance, the whole interest or income as it accrues vests absolutely in the legatee. *Harris v. Finch*, M'Clel. 141; *In re Peek's Trust*, 16 Eq. 221.

Legacy  
charged on  
land only.

Where a legacy is charged upon land only, interest is payable from the testator's death. *Spurway v. Glyn*, 9 Ves. 483; *Shirt v. Westby*, 16 Ves. 393; *Pearson v. Pearson*, 1 Sch. & Lef. 10.

Legacy  
charged on  
proceeds of  
sale of land.

An immediate legacy charged on the proceeds of sale of land carries interest only from a year after the death, but if the legacy is given at the death of the tenant for life, when the land is to be sold, it carries interest from the death of the



tenant for life. *Turner v. Buck*, 18 Eq. 301; *In re Waters*; **Chap. XVII.**  
*Waters v. Boxer*, 42 Ch. D. 517.

In the case of legacies not charged on land only, the rule is that the legacy carries interest from the time when it is payable:—

(A.) Where no time of payment is fixed:—

General legacies, including gifts by appointment under a power vested in a married woman, are payable at and carry interest from the end of a year from the testator's death. *Tatham v. Drummond*, 2 H. & M. 262.

In the same way in the case of a gift of a sum of money to one for life with remainders over, interest begins to run from the end of a year from the testator's death. *Gibson v. Bott*, 7 Ves. 89; *In re Whittaker*; *Whittaker v. Whittaker*, 21 Ch. D. 657. Legacy for life with remainder.

Where the tenant for life is a minor, and a portion of the income is accumulated during the minority, the accumulations belong to the tenant for life; and sect. 43 of the Conveyancing Act, 1881, does not convert them into capital. *In re Humphreys*; *Humphreys v. Levett*, (1893) 3 Ch. 1.

Directions that a legacy is to be paid as soon as possible, or that it is not to be payable till six months after the testator's death, or that it is to be paid within four years from his decease, do not alter the date from which interest will run. *Webster v. Hale*, 8 Ves. 410; *Benson v. Maude*, 6 Mad. 15; *Varley v. Winn*, 2 K. & J. 700; *Jauncey v. A.-G.*, 3 Giff. 308; *In re Olive*; *Olive v. Westerman*, 32 W. R. 608. Power to accelerate or postpone payment.

Where there is a clear gift of a legacy, a direction to pay it out of a particular fund when received will not alter the rule that the legatee is entitled to interest from the end of a year after the testator's death. *Wood v. Penoyre*, 13 Ves. 326; see *Kirkpatrick v. Bedford*, 4 App. C. 96. Direction to pay out of fund when received.

If the trust to pay legacies only arises after the fund is got in, interest is not payable till then. *Lord v. Lord*, L. R. 2 Ch. 782.

A direction to apply a sum for building a church when it is wanted, without interest in the meantime, will not deprive the legacy of interest if payment is delayed by litigation. *Fisher v. Brierley*, 30 B. 268.

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Effect of  
charge on a  
reversionary  
interest.

The rule as to interest is not altered by the fact that the legacies are charged upon personalty and a reversionary interest in realty, and if the personalty is insufficient, the legacies nevertheless bear interest from a year after the death. *Freeman v. Simpson*, 6 Sim. 75; *Earl of Milltown v. French*, 4 Cl. & F. 276; 10 Bl. N. S. 1; *In re Blachford*; *Blachford v. Worsley*, 27 Ch. D. 676.

But this is not the case where the fund out of which the legacy is primarily payable is wholly reversionary. *Earle v. Bellingham*, 24 B. 448; *Re Ludlam*; *Ludlam v. Ludlam*, 68 L. T. 330.

Legacy to  
executor.

Interest upon a legacy to an executor as such runs from the time when he assumes the office. An infant cannot assume the office till he attains twenty-one. *Angermann v. Ford*, 29 B. 349; *Re Gardner*; *Long v. Gardner*, 67 L. T. 552; 41 W. R. 298; 3 R. 96.

Interest  
payable from  
the death.

On the other hand, interest is payable from the testator's death:—

Testator in  
*loco parentis*  
to an infant.

1. Where the testator is the father or in *loco parentis* to the legatee, provided the latter is an infant. *Wilson v. Maddison*, 2 Y. & C. C. 372.

If the infant is *in ventre* at the testator's death, interest runs only from his birth. *Rawlins v. Rawlins*, 2 Cox, 425.

Maintenance  
directed out  
of the legacy.

2. Where the legatee, though a stranger, is an infant, and maintenance is given out of the legacy. *Newman v. Bateson*, 3 Sw. 689.

Legacy in  
satisfaction of  
a debt.

3. Where the legacy is in satisfaction of a debt of the testator. *Clarke v. Sewell*, 3 Atk. 99.

A legacy to a wife does not carry interest until a year from the death (a), even if given in lieu of jointure or in lieu of dower and freebench (b). *Stent v. Robinson*, 12 Ves. 461; *Lowndes v. Lowndes*, 15 Ves. 301; *In re Percy*; *Percy v. Percy*, 24 Ch. D. 616; *In re Bignold*; *Bignold v. Bignold*, 45 Ch. D. 496 (a); *Elton v. Montague*, 1 L. J. Ch. (O. S.) 212; *In re Bignold*; *Bignold v. Bignold*, 45 Ch. D. 496 (b).

A legacy in satisfaction of the debts of another person will not *primâ facie* carry interest till the expiration of a year from the testator's death. *Askeu v. Thompson*, 4 K. & J. 620.

But if certain property is to be applied among such persons as have "any just or indisputable demand" upon a third person, interest will be payable on the debts as far as the fund will go. *Aston v. Gregory*, 6 Ves. 151. Chap. XVII.

(B.) Where a time for payment is fixed :—

A legacy payable at a future day, whether vested or not, carries interest only from the time fixed for its payment. *Lloyd v. Williams*, 2 Atk. 108; *Heath v. Perry*, 3 Atk. 101; *Crickett v. Dolby*, 3 Ves. 10; *Tyrrell v. Tyrrell*, 4 Ves. 1; *Festing v. Allen*, 5 Ha. 575; *Gotch v. Foster*, 5 Eq. 311; *Lord v. Lord*, L. R. 2 Ch. 782; *Holmes v. Crispe*, 18 L. J. Ch. 489. When a time of payment is fixed, interest runs from then.

If the residuary legatee has a discretion to postpone payment for a given period and he exercises it, interest runs only from the end of the period. *Thomas v. A.-G.*, 2 Y. & C. Ex. 525.

If the time for payment arrives in the testator's lifetime, interest runs from his death. *Coventry v. Higgins*, 14 Sim. 30; *Pickwick v. Gibbes*, 1 B. 271.

The personal representatives of a legatee entitled to a vested legacy stand in no better position than the legatee; therefore, where a time for payment is fixed and the legatee would not have been entitled to interest in the meantime, the legacy is not payable to the personal representatives till the time when it would have been payable to the legatee. *Chester v. Painter*, 2 P. W. 386; *Roden v. Smith*, Amb. 588; *Maher v. Maher*, 1 L. R. Ir. 22.

But though a period is appointed for payment, or the legacy is contingent, interest runs from the death :— Exceptions.

1. Where the legatee is an infant child of the testator, or an infant to whom the testator has placed himself in *loco parentis*, and the will provides no other maintenance, whether the legacy be vested or contingent. *Harvey v. Harvey*, 2 P. W. 21; *Incedon v. Northcote*, 3 Atk. 432, 438; *Donoran v. Needham*, 9 B. 164; *May v. Potter*, 25 W. R. 507; see *Mole v. Mole*, 1 Dick. 310. Testator in loco parentis to an infant.

If the testator has made a provision for the maintenance of his infant children, interest only runs from the time when the Provision for maintenance.

**Chap. XVII.** legacy is payable. *Hearle v. Greenbank*, 3 Atk. 695, 716; 1 Ves. Sen. 298; *Wynch v. Wynch*, 1 Cox, 438; see *In re George*, 5 Ch. D. 837.

Apparently a gift of residue to the children, the income of which, by virtue of the Conveyancing Acts, would be applicable for their maintenance, would not alter the rule. *In re Moody; Woodroffe v. Moody*, (1895) 1 Ch. 101.

A power to raise part of the expectant share of a child and apply the same for his advancement, preferment or benefit, does not alter the rule. *In re Moody; Woodroffe v. Moody, supra*.

Where there is provision for maintenance during part of the minority, interest on the legacy will be allowed during the rest. *Chambers v. Goldwin*, 11 Ves. 1; *Martin v. Martin*, L. R. 1 Eq. 369; see *Cusack v. Jellicoe*, 22 W. R. 844.

2. If the infant legatee is a stranger, but the income is given for maintenance, interest runs from the death. *In re Richards*, 8 Eq. 119; *Chidgey v. Whitby*, 41 L. J. Ch. 699.

General  
intention to  
provide main-  
tenance.

3. Upon similar grounds, where the legatees are strangers, if a general intention is expressed of providing for their maintenance out of their legacies, interest runs from the death. *Pett v. Fellows*, 1 Sw. 561, n.; *Lambert v. Parker*, Coop. t. Eldon, 143; *Leslie v. Leslie*, Ll. & G. t. Sug. 1.

The fact that maintenance is given in one particular event which does not happen, is not enough. *Festing v. Allen*, 5 Ha. 575.

Future gift of  
principal with  
interest.

Where there is a future gift of principal "with interest," interest is calculated from the end of a year after the testator's death till the time of payment. *Knight v. Knight*, 2 S. & St. 490.

Vested legacy  
divested.

Where a vested legacy is given to an infant, and no time of payment is fixed, and the legacy is given over upon a contingency, the infant or his representatives are entitled to the interest which has accrued due till the contingency happens. *Taylor v. Johnson*, 2 P. W. 504; *Barber v. Barber*, 3 M. & Cr. 688; *Mills v. Roberts*, 1 R. & M. 555.

The provisions of Lord Cranworth's Act (23 & 24 Vict. c. 145), sect. 26, and the Conveyancing Act, 1881, sect. 43,

sub-s. (2), enabling trustees to apply the income of infants' property towards their maintenance, and directing the residue to be accumulated for the benefit of the persons ultimately entitled to the property, do not alter the law so as to deprive the representatives of the infant of accumulations made before the gift over takes effect. *In re Buckley's Trusts*, 22 Ch. D. 588; *In re Wells; Wells v. Wells*, 43 Ch. D. 281; *In re Humphreys; Humphreys v. Levett*, (1893) 3 Ch. 1.

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The person taking a vested interest under the gift over, no condition as to payment being annexed to his gift, is entitled to interest from the time when the gift over takes effect, or from a year after the testator's death, whichever period is latest. *Laundy v. Williams*, 2 P. W. 481.

The rate of interest allowed is 4 per cent., and as the rate is fixed by rule of Court (Order 55, rule 64) it cannot be altered except by rule. It appears to be settled that that rate only will be allowed though the personalty is in a country where the current rate of interest is higher. *Bourke v. Ricketts*, 10 Ves. 380; *Hamilton v. Dallas*, 38 L. T. 215.

Rate of interest.

A direction to pay interest at the rate of 3 per cent. half-yearly, gives the legatees interest at 6 per cent. per annum. *Re Booker; Booker v. Booker*, 54 L. T. 239.

In the case of a power to direct portions to be raised out of land, if the power enables the donee to direct whether the portion is to be raised or not, he may also fix the rate of interest.

Interest on portions.

But if the power merely enables the donee to distribute the portions, only the ordinary rate of interest can be allowed, namely, 4 per cent. in the case of land in England, 5 per cent. in the case of land in Ireland. *Balfour v. Cooper*, 28 Ch. D. 472.

If the power authorises the appointment of interest the donee may, if it is beneficial for the infants, direct the portions to carry interest to be payable to himself as the guardian of his children. *In re De Hoghton; De Hoghton v. De Hoghton*, (1896) 2 Ch. 385.

With regard to arrears of interest in cases where the Statute of Limitations does not apply, the Court will, in cases of delay,

Arrears of interest.

Chap. XVII. follow the analogy of the statute, and allow only six years arrears to be recovered. *Thomson v. Eastwood*, 2 App. C. 215.

#### IX. PAYMENT OF ANNUITIES.

From what  
time annuities  
are payable.

An annuity begins to run from the death of the testator; the first payment is therefore due at the end of a year unless the annuity is directed to be paid monthly or quarterly, in which case instalments are payable at the end of the first month or quarter. *Houghton v. Franklin*, 1 S. & St. 390.

If payment on stated quarterly days is directed, a proportional part is payable on the first quarterly day. *Williams v. Wilson*, 5 N. R. 266.

If the first payment of an annuity payable quarterly is directed to be made at the end of eighteen months, a quarter's instalment is payable at that time. *Irrin v. Ironmonger*, 2 R. & M. 531.

As to the postponement of an annuity till debts and legacies are paid, see *Astley v. Earl of Essex*, 6 Ch. 898; *Rawson v. M'Causland*, 1 R. 7 Eq. 284; 22 W. R. 145.

Sum to pro-  
duce annuity.

Where a sum of money is directed to be invested in the purchase of an annuity, the gift is to be considered as a legacy payable at the end of a year. *In re Friend*; *Friend v. Young*, 78 L. T. 222; *Gibson v. Bott*, 7 Ves. 89.

Arrears of an  
annuity do  
not carry  
interest.

Arrears of an annuity will not as a rule carry interest. *Batten v. Earnley*, 2 P. W. 163; *Anderson v. Dwyer*, 1 Sch. & Lef. 301; *Martin v. Blake*, 3 Dr. & War. 125; *Taylor v. Taylor*, 8 Ha. 120; *Torre v. Browne*, 5 H. L. 555; *Wheateley v. Davies*, 24 W. R. 818.

#### X. LEGACY DUTY AND INCOME TAX.

Legacy duty—  
what amounts  
to a gift free  
from duty.

Legacy duty, in the absence of a direction to the contrary, is in all cases payable by the legatee even though the legacy is to a creditor in discharge of a debt due from a third person. *Foster v. Ley*, 2 Sc. 438; 2 B. N. C. 269.

Direction to  
pay legacy  
duty.

A direction to pay legacy duty does not include succession duty payable in respect of leaseholds. *In re Johnston*; *Cockerell v. Earl of Essex*, 26 Ch. D. 538.

A general direction in the will to pay all legacies free of deduction for tax or duty will include legacies given by a codicil. *Byne v. Currey*, 2 Cr. & Mee. 603; 4 Tyr. 479. See *Kirkpatrick v. Bedford*, 4 App. C. 96. Chap. XVII.

But a direction in the will to pay the duty on legacies "herein given" will not include legacies given by a codicil. *Early v. Benbow*, 2 Coll. 354; *Gillooly v. Plunkett*, 9 L. R. Ir. 324. See *Bonner v. Bonner*, 13 Ves. 378; *Radburn v. Jervis*, 3 B. 450. Legacies  
herein given.

In some cases, however, such words as "foregoing legacies" or "herein mentioned" have upon the general intention been extended to legacies given by a codicil. *Williams v. Hughes*, 24 B. 474; *Jauncey v. A.-G.*, 3 Giff. 308.

A direction to pay legacies free of duty is not necessarily limited to pecuniary legacies, but may include a debt which is forgiven, and stock legacies and specific legacies. *Morris v. Lirie*, 11 L. J. Ch. 172; *Ansley v. Cotton*, 16 L. J. Ch. 55; *In re Johnston*; *Cockerell v. Earl of Essex*, 26 Ch. D. 538.

A direction to pay the legacy duty on the legacies and bequests given by the testator has been held not to include the duty on the proceeds of sale of realty directed to be sold and held on certain trusts. *White v. Lake*, 6 Eq. 188.

Legacies given free from deduction or free from expense, or free from charge or liability, are free from duty. *Barksdale v. Gilliatt*, 1 Sw. 652; *Courtoy v. Vincent*, T. & R. 433; *Gosden v. Dotterill*, 1 M. & K. 56; *Louch v. Peters*, 1 M. & K. 489; *Warbrick v. Varley*, 30 B. 241; see *Stow v. Davenport*, 5 B. & Ad. 357; 2 Nev. & M. 335; and see *Turner v. Mullineux*, 1 J. & H. 334. Free from  
deductions.

A sum to be paid without any deduction is free from estate duty and from settlement estate duty. *In re Parker-Jervis*; *Salt v. Locker*, (1898) 2 Ch. 642; *In re Maryon-Wilson*; *Wilson v. Maryon-Wilson*, (1900) 1 Ch. 565.

A direction to pay the duties "payable by law out of my estate" does not include settlement estate duty. *Re Lewis*; *Lewis v. Smith*, 82 L. T. 291.

A gift of a clear or net sum or annuity is a gift clear of legacy duty. *Gude v. Mumford*, 2 Y. & C. Ex. 448; *Haynes* Gift of a  
"clear" sum.

**Chap. XVII.** *v. Haynes*, 3 D. M. & G. 590; *In re Currie*; *Bjorkman v. Lord Kimberley*, 57 L. J. Ch. 743; 59 L. T. 200; 36 W. R. 752; *In re Saunders*; *Saunders v. Gore*, (1898) 1 Ch. 17.

This is the case although in another part of the will a clear yearly sum is expressed to be given free of legacy duty. *Re Robins*; *Nelson v. Robins*, 58 L. T. 382.

The same principle applies in the case of an appointment, and a direction to raise a net sum which is to belong to a donee is a gift of the sum free from succession duty. *In re Saunders*; *Saunders v. Gore*, (1898) 1 Ch. 17.

A gift of a fund to produce a clear annual sum, which sum is to be paid to the legatee is also free of duty. *Morris v. Burton*, 11 Sim. 161; *Cole's Will*, 8 Eq. 271.

The distinction which has been made between such a gift and a gift of a fund to produce a clear annual sum, and to pay the dividends of the stock, and not the exact sum to the legatee, cannot now be relied on. *Banks v. Braithwaite*, 32 L. J. Ch. 35; see *In re Saunders*, *supra*.

The case may be different if the annuity is given to persons in succession who would pay different rates of duty. *Sanders v. Kiddell*, 7 Sim. 536; *Pridie v. Field*, 19 B. 497.

A gift to employes of their "full salary" is not free from legacy duty, the word full being referred to incidental deductions. *In re Marcus*; *Marcus v. Marcus*, 56 L. J. Ch. 830; 57 L. T. 399.

#### Income tax.

A direction to pay an annuity free from deduction or abatement will not release the legatee from paying income tax, unless the testator shows that he regards income tax as a deduction. *Abadam v. Abadam*, 12 W. R. 615; 33 B. 475; *Turner v. Mullineux*, 1 J. & H. 334; *Sadler v. Rickards*, 4 K. & J. 302; *Peareth v. Marriott*, 22 Ch. D. 182; *Gleadow v. Leatham*, 22 Ch. D. 269; *In re Buckle*; *Williams v. Marson*, (1894) 1 Ch. 286.

But the testator may by proper words direct the income tax upon an annuity to be paid out of his estate. *Festing v. Taylor*, 11 W. R. 70; 3 B. & S. 217, 235; *Lord Lorat v. Duchess of Leeds*, 10 W. R. 397; 2 Dr. & Sm. 62; *In re Bannerman's Estate*; *Bannerman v. Young*, 21 Ch. D. 105.



## CHAPTER XVIII.

## THE MEANING OF CERTAIN WORDS.

## Chap. XVIII.

**MONEY** includes bank notes (*a*), money at the bank on a current account as well as on deposit (*b*), money in the hands of an agent of the testator (*c*), apparently arrears of a superannuation allowance from government, and money payable by a friendly society for funeral expenses (*d*), and any money, of which at the time of the testator's death he might have claimed immediate payment (*e*). *Chapman v. Hart*, 1 Ves. Sen. 271 (*a*); *Manning v. Purcell*, 7 D. M. & G. 55 (*b*); *Ogle v. Knipe*, 8 Eq. 434 (*c*); *Collins v. Collins*, 12 Eq. 455 (*d*); *Byrom v. Brandreth*, 16 Eq. 475 (*e*).

Money—what it includes.

It will not pass an apportioned part of an annuity nor accruing interest or dividends (*a*), nor money deposited with a stakeholder to abide the event of a bet (*b*), nor money due on a current account from a salesmaster (*c*), nor a legacy not acknowledged to be at the testator's disposal (*d*), nor stock in the funds (*e*), nor a sum due to the testator (*f*). *Byrom v. Brandreth*, 16 Eq. 475; see *Re Bearan*; *Bearan v. Bearan*, 58 L. T. 245 (*a*); *Manning v. Purcell*, 7 D. M. & G. 55 (*b*); *Smith v. Butler*, 3 J. & L. 565; *De Roebuck v. Lord Cloncurry*, 1 R. 5 Eq. 588 (*c*); *Byrom v. Brandreth*, 16 Eq. 475 (*d*); *Hotham v. Sutton*, 15 Ves. 319; *Gosden v. Dotterill*, 1 M. & K. 56; *Ommaney v. Butcher*, T. & R. 260; *Lowe v. Thomas, Kay*, 369; 5 D. M. & G. 315; *Collins v. Collins*, 12 Eq. 455 (*e*); *Dillon v. McDonnell*, 7 L. R. Ir. 335 (*f*).

What it does not include.

Money will, however, pass stock where there is at the date of the will and the death no money properly so called; or where stock is expressly referred to as money. *Chapman v. Reynolds*, 28 B. 221; *Newman v. Newman*, 26 B. 218.

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When the  
word money  
will pass the  
residue.

In some cases a larger sense has been given to the term money, and it has been held to pass the residuary personalty:—

1. It is clear that a gift of “the whole of my money” will only pass money properly so called, though there may be very little of it, and it is given for life with remainders, at any rate where the gift is followed by specific or general bequests. *Lowe v. Thomas*, Kay, 369; 5 D. M. & G. 315; *Larner v. Larner*, 8 Dr. 704.

So, too, money must be construed strictly where it is used as one of several terms of description, showing that it was not alone meant to pass the personal estate. *Cowling v. Cowling*, 26 B. 449; see *In bonis Aston*, 30 W. R. 92.

2. But where the testator declared himself desirous of making a settlement of his affairs, and appointed executors to take and receive all moneys in his possession or due to him, the whole personal estate was held to pass. *Waite v. Combes*, 5 De G. & S. 676.

And a gift of all my money except a sum “invested in the Belgravian Dairy Co.” was held to pass the general personal estate. *Re Buller*; *Buller v. Giberne*, 74 L. T. 406.

And in *Prichard v. Prichard*, 11 Eq. 232, the whole personal estate was held to pass under a gift of the “income of my principal money” to A for life, and afterwards to be divided among her children, apparently on the ground that there was only a sum of 239*l.* money proper at the testator’s death. See *Cooke v. Wagster*, 2 Sm. & G. 296.

And in *In re Cadogan*; *Cadogan v. Palagi*, 25 Ch. D. 154, the whole personal estate passed under a gift of “one half of the money of which I am possessed” to A, “and the remainder to” B. See, too, *In re Townley*; *Townley v. Townley*, 32 W. R. 549.

Gifts of resi-  
due of money  
after payment  
of debts and  
legacies.

When there is a direction to pay debts, or legacies have been given, and the residue of money is then given, the whole personal estate will pass. The general personalty being liable to pay debts and legacies, the residue must be a residue *ejusdem generis*. *Lynn v. Kerridge*, West. Rep. tem. Hard. 172; *Legge v. Asgill*, T. & R. 265, n.; *Rogers v. Thomas*, 2 Kee. 8; *Dowson v. Gaskoin*, *ib.* 14; *Stocks v. Barré*, Jo. 54;

*Barrett v. White*, 24 L. J. Ch. 724; 1 Jur. N. S. 652; *Grosvenor v. Durston*, 25 B. 99; *In bonis White*, 7 P. D. 65; *In re Hart*; *Hart v. Hernandez*, 52 L. T. 217; *In re Smith*; *Henderson-Roe v. Hitchins*, 42 Ch. D. 302; *In re Egan*; *Mills v. Penton*, (1899) 1 Ch. 688. See, too, *Langdale v. Whitfield*, 4 K. & J. 426; *Re Maclean*; *Williams v. Nelson*, 11 T. L. R. 82. Chap. XVIII.

In such a case the fact that a specific legacy is afterwards given makes no difference. *Montagu v. Earl of Sandwich*, 33 B. 324; *In re Pringle*; *Walker v. Stuart*, 17 Ch. D. 819.

Similarly, where the testator gave his money and goods to his wife for life, and at her death bequeathed certain legacies and the remainder of his property, the money was held to include the personal estate, as the testator showed that he was disposing at his wife's death of the same property as he meant her to have for life. *Glendening v. Glendening*, 9 B. 324.

A gift of "the rest of my money however invested" has been held to pass the residuary personal estate. *In re Pringle*; *Walker v. Stuart*, 17 Ch. D. 819.

Of course, if there is an express gift of residue, money must be construed in its strict sense. *Willis v. Plaskett*, 4 B. 208.

See as to the meaning of a direction to pay debts out of money, when there is a residuary bequest, *Lloyd v. Lloyd*, 54 L. T. 841; 34 W. R. 608.

And a gift by codicil of "all moneys that may be left after my decease" where there is a gift of residue in the will, passes only money properly so called. *Williams v. Williams*, 8 Ch. D. 789.

Such words as "ready money" (a), or "money to my account" (b), or "money in bonds or consols or anything else" (c), or money referred to as "cash" (d), would require a very strong context to pass more than would be included in the words if taken in the ordinary sense. *Re Popcell*, Jo. 49; *Beran v. Beran*, 5 L. R. Ir. 57 (a); *Hastings v. Hane*, 6 Sim. 67 (b); *Stooke v. Stooke*, 35 B. 396 (c); *Nevinson v. Lady Lennard*, 34 B. 487 (d); see *In re Sutton*; *Stone v. A.-G.*, 28 Ch. D. 464. Ready money, &c.

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Money "of  
or to which  
I may be  
possessed or  
entitled."

Money due and  
owing.

"Money of or to which the testator may be possessed or entitled," will include moneys due on security or otherwise. *Langdale v. Whitfield*, 4 K. & J. 426; see *Wilkes v. Collin*, 8 Eq. 338.

"Money due and owing at the testator's decease" will pass a balance at the bank (*a*), stock (*b*), damages recovered by the executor and unliquidated at the time of the death (*c*), money receivable on a policy of insurance upon the testator's life (*d*), and money due to the testator from an executor where the estate has been got in before the testator's death (*e*). *Carr v. Carr*, 1 Mer. 541 (*a*); *Waite v. Combes*, 5 De G. & S. 676 (*b*); *Bide v. Harrison*, 17 Eq. 76 (*c*); *Petty v. Wilson*, 4 Ch. 574 (*d*); *Bainbridge v. Bainbridge*, 9 Sim. 16 (*e*). See *Byrom v. Brandreth*, 16 Eq. 475.

Such words will not pass a distributive share in a residuary personal estate not proved to have been got in at the time of the death; nor money due on a contract of service not completed till after the testator's death. *Martin v. Hobson*, 8 Ch. 401; *Stephenson v. Dowson*, 3 B. 342. See *Collins v. Doyle*, 1 Russ. 185.

Ready money.

"Ready money" will pass money at call at a bank, or in the hands of an agent used as a banker and money on a drawing account, and on a deposit account, for which no notice of withdrawal was wanted, and a deposit receipt payable without notice. *Parker v. Marchant*, 1 Y. & C. C. 290; 1 Ph. 356; *Powell's Trust*, Jo. 49; *Vaisey v. Reynolds*, 5 Russ. 12; *Fryer v. Rankin*, 11 Sim. 55; *Stein v. Ritterdon*, 37 L. J. Ch. 369; *Mayne v. Mayne*, (1897) 1 Ir. 324.

It will not pass notes of hand (*a*), nor debts due from an agent (*b*), or in the hands of a salesmaster (*c*), nor dividends not demanded (*d*), nor rent or interest due on a mortgage (*e*), nor deposit receipts payable only on notice (*f*), nor proportionate parts of pensions, interest on mortgages and dividends (*g*). *Powell's Trust*, Jo. 49 (*a*); *Parker v. Marchant*, 1 Y. & C. C. 290 (*b*); *Smith v. Butler*, 1 J. & L. 692 (*c*); *May v. Grove*, 3 De G. & S. 462 (*d*); *Fryer v. Rankin*, 12 Sim. 55 (*e*); *Mayne v. Mayne*, *supra* (*f*); *Stein v. Ritterdon*, *supra* (*g*).

Similarly "cash" will not include bonds, long annuities or promissory notes. *Beales v. Crisford*, 13 Sim. 592. Chap. XVIII.  
Cash.

A gift of "all I hold in the bank" has been held to pass deposit receipts and cash. *Townsend v. Townsend*, 1 L. R. Ir. 180.

As to the meaning of the words "money in the funds," see *Burnie v. Getting*, 2 Coll. 324; *Mangin v. Mangin*, 16 B. 300; *Ridge v. Newton*, 2 D. & War. 239; *Slingsby v. Grainger*, 7 H. L. 273; *Ellis v. Eden*, 23 B. 543; *Brown v. Brown*, 6 W. R. 613. Money in the funds.

A devise of lands "purchased" by the testator may include lands taken in exchange. *Doe d. Meyrick v. Meyrick*, 1 Cr. & M. 820; 3 Tyr. 916. "Purchased."

A bequest of funds "purchased" out of separate estate will not pass savings of separate estate at the bank. *Askew v. Rooth*, 17 Eq. 426.

Nor will a gift of "property bequeathed to me" pass property intended to be bequeathed to the testator, but in fact given to him by act *inter vivos*. *In re Armstrong*, 49 L. J. Ch. 53.

"Securities for money" will not pass a balance on current account at the bank (a), money on a deposit account (b), shares (c), bank stock (d), mere debts (e), or money lent on mortgage where the legal estate is in trustees, and the testator is entitled only to the residue after certain payments (f). *Vaisey v. Reynolds*, 5 Russ. 12 (a); *Hopkins v. Abbott*, 19 Eq. 222 (b); *Huddleston v. Gouldbury*, 10 B. 547; *Turner v. Turner*, 21 L. J. Ch. 843; *McDonnell v. Morrow*, 23 L. R. Ir. 591; see *Murphy v. Doyle*, 29 L. R. Ir. 333 (c); *Ogle v. Knipe*, 8 Eq. 434 (d); *Re Mason's Will*, 34 B. 494 (e); *Ogle v. Knipe*, *supra* (f). Securities for money.

But it passes a lien for unpaid purchase-money (a), consols (b), money lent on mortgage, the right to receive which is in the testator (c), and railway debenture stock (d). *Callow v. Callow*, 42 Ch. D. 550, distinguishing *Goold v. Teague*, 7 W. R. 84; 5 Jur. N. S. 116 (a); *Bescoby v. Pack*, 1 S. & St. 500; *Re Beavan*; *Beavan v. Beavan*, 53 L. T. 245 (b); *Ogle v. Knipe*, 8 Eq. 434 (c); *Re Beavan*; *Beavan v. Beavan*, 53 L. T. 245 (d).

Chap. XVIII. An I O U is not, but a promissory note is, a security for money. *Barry v. Harding*, 1 J. & Lat. 475; *Re Beavan*; *Beavan v. Beavan*, 53 L. T. 245.

As to the meaning of securities for money and similar expressions, see also *Ogle v. Knipe*, 8 Eq. 434; *Earl Poulett v. Hood*, 35 B. 234.

Whether the legal estate in a mortgage passes.

In cases of death before the 1st of January, 1882 (see the Conveyancing Act, sect. 30), the term securities for money passes the legal estate in mortgaged property whether there are words of limitation or not. *King's Mortgage*, 5 De G. & S. 644; *Ex parte Barber*, 5 Sim. 451; *Mather v. Thomas*, 6 Sim. 115; 10 Bing. 44; 3 M. & Sc. 687; *Rippen v. Priest*, 13 C. B. N. S. 308.

This is the case though the subject-matter of the gift is expressly made subject to payment of debts, a direction inapplicable to the legal estate. *Re Field*, 9 Ha. 414; *Knight v. Robinson*, 2 K. & J. 503; overruling *Silvester v. Jarman*, 10 Pr. 78.

It seems the fact that the gift is to several persons as tenants in common, would not prevent the legal estate from passing. *Ex parte Whiteacre*, cited 1 Sand. on Uses, 359, n.; 1 Jar. 649.

Mortgages on real security.

Mortgages on real security do not include mortgages of turnpike road tolls and of turnpike road toll-houses. *Cavendish v. Cavendish*, 24 Ch. D. 685; 30 Ch. D. 227.

Money on security.

It seems doubtful whether, before the Conveyancing Act, the term "money on security" would by itself pass the legal estate in mortgaged property; but it did if the donee was to receive the money on security, &c. *Re Cantley or Cautley*, 17 Jur. 124; 22 L. J. Ch. 391; *Doe d. Guest v. Bennett*, 6 Ex. 892; *Arrowsmith's Trust*, 27 L. J. Ch. 704; 4 Jur. N. S. 1123; see *Brown v. Brown*, 6 W. R. 613.

Rights and credits.

Possibly the expression rights and credits might pass the personal estate. *Hutchinson v. Hutchinson*, 13 Ir. Eq. 332.

Debts.

A gift to A of the debts due from him to the testator means the debts remaining after deducting a debt due from the testator to A. *Ekins v. Morris*, 8 W. R. 301; *Ganly v. Dowling*, 5 L. R. Ir. 628.

Book debts.

Book debts appear to mean the amount due to the testator

after deducting trade debts and private debts due from him. Chap. XVIII.  
*Chick v. Blackmore*, 2 Sm. & G. 274.

A gift to A of a debt due from him means a debt due from him solely if there is such a debt, and not a debt due from the firm to which A belongs. *Ex parte Kirk*; *In re Bennett*, 5 Ch. D. 800.

In the same way a bequest of a debt due to the testator from A would naturally mean a debt due to the testator alone, and not the testator's share of a debt due from A to the testator's firm, though it may have that meaning if there is no debt due to the testator solely. *Maybery v. Brooking*, 7 D. M. & G. 673.

A direction to pay to a creditor a debt owing by the testator, the amount of which is overstated, will not entitle the creditor to more than the sum due unless there is something in the will to show that the creditor was to have the sum named. *Whitfield v. Clemment*, 3 Mer. 402; *Wilson v. Morley*, 5 Ch. D. 776; see *Re Dyke*; *Dyke v. Dyke*, 44 L. T. 568; *In re Rowe*; *Pike v. Hamlyn*, (1898) 1 Ch. 153.

Mistake as to debt.

A bequest of a certain sum described as the amonut in which the legatee is indebted to the testator would entitle the legatee to the sum given, though the debt may be paid before the death of the testator. *Vickers v. Pound*, 6 H. L. 885.

A direction that a debtor is to be released from all claims in respect of moneys "now owing" to the testator, and all other moneys due from him, will release the debtor from advances made subsequent to the date of the will. *Everett v. Everett*, 7 Ch. D. 428; see p. 118.

Under the description railway shares, shares and stock will pass together. *Morrice v. Aylmer*, L. R. 10 Ch. 148; *ib.* 7 H. L. 717, overruling *Oakes v. Oakes*, 9 Ha. 666.

Railway shares.

As to the meaning of mining shares, see *Duchess of Cleveland v. Meyrick*, 37 L. J. Ch. 125.

Mining shares.

Foreign bonds will not include colonial bonds. *Hull v. Hill*, 4 Ch. D. 97; and see *Cadett v. Earle*, 46 L. J. Ch. 798.

Foreign bonds.

A gift of plate does not include plated articles. *Holden v. Ramsbottom*, 4 Giff. 205.

Plate.

Furniture *primâ facie* includes only such furniture as is reserved for domestic or personal use. *Le Farrant v. Spencer*,

Furniture.

**Chap. XVIII.** 1 Ves. Sen. 97; *Pratt v. Jackson*, 2 P. W. 302; 1 B. P. C. 222; *Manning v. Purcell*, 2 Sm. & G. 284; 7 D. M. & G. 55; *Domvile v. Taylor*, 32 B. 604; *Manton v. Tabois*, 30 Ch. D. 92.

It includes plate and pictures and probably ornaments; but not wine or books or tenant's fixtures or an altar stone and relics. *Kelly v. Pourlett*, Amb. 605; *Porter v. Tournay*, 3 Ves. 311; *Field v. Peckett*, 9 W. R. 526; *Finney v. Grice*, 10 Ch. D. 13; *In re Londesborough*; *Bridgman v. Fitzgerald*, 50 L. J. Ch. 9; see, too, *Cole v. Fitzgerald*, 1 S. & St. 189; 3 Russ. 301; *Birch v. Dawson*, 2 A. & E. 37; *Petre v. Ferrers*, 61 L. J. Ch. 426; 65 L. T. 568.

A gift of furniture in a house passes only the furniture permanently kept there. *Wilkins v. Jodrell*, 11 W. R. 588.

**Effects.**

Effects in a gift of furniture and effects, or of effects following an enumeration of chattels personal will in general be restricted to things *ejusdem generis* as those described by the words which it follows. It has been held under such circumstances not to include jewellery (a) or bank-notes, stock-receipts, and certificates of railway stock (b) but to include wine (c) and horses and carriages (d). *Northey v. Paxton*, 60 L. T. 30; *Re Miller*; *Daniel v. Daniel*, 61 L. T. 365 (a); *Re Miller*, *supra* (b); *Re Bourne*; *Bourne v. Brandreth*, 58 L. T. 537 (c); *Re Hammersley*; *Heasman v. Hammersley*, 81 L. T. 150.

But a gift of all other effects, following an enumeration of specific things, may pass the residuary personalty where there is no other residuary gift. *In bonis Jupp*, (1891) P. 300; *Re Parrott*; *Parrott v. Parrott*, 53 L. T. 12. See *Anderson v. Anderson*, (1895) 1 Q. B. 749.

**Household goods.**

A gift of household goods or household furniture where the testator has furniture at his private house, and also at his place of business, does not pass the latter. *Pratt v. Jackson*, 2 P. W. 302; 1 B. P. C. 222; *Le Farrant v. Spencer*, 1 Ves. Sen. 97; *Manning v. Purcell*, 7 D. M. & G. 55.

**Household ornament.**

A gift of articles of household or domestic ornament may include valuable orchids used to adorn the house. *Re Owen*; *Peat v. Owen*, 78 L. T. 643.

**Objects of virtu.**

"Objects of virtu or taste" would not, as a general rule, include valuable pictures. *In re Londesborough*; *Bridgman v. Fitzgerald*, 50 L. J. Ch. 9.



A bequest of chattels in a house will not pass choses in action, such as bonds or securities for money in the house, which are considered not property in the house, but evidence of title to property elsewhere. *Green v. Symonds*, 1 B. C. C. 129, n. ; *Lady Aylesbury's Case*, 11 Ves. 662 ; *Chapman v. Hart*, 1 Ves. Sen. 271 ; *Moore v. Moore*, 1 B. C. C. 127 ; *Fleming v. Brook*, 1 Sch. & L. 318 ; *Brooke v. Turner*, 7 Sim. 671 ; *Hertford v. Lowther*, 7 B. 1 ; see *Re Miller* ; *Daniel v. Daniel*, 61 L. T. 365.

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Chattels in a house.

Bank-notes will pass under such a bequest. *Popham v. Lady Aylesbury*, Amb. 68 ; *Brooke v. Turner*, *supra*.

A gift of articles in or about the testator's mill has been held not to pass a cargo of wheat in course of transit at the testator's death. *Lane v. Sewell*, 43 L. J. Ch. 378.

The expression property used with reference to a locality has a wider meaning than goods and chattels in a locality. Property in a locality.

Thus "my property in England," would include money in the funds, debts owing in England, arrears of a pension and the like. *Arnold v. Arnold*, 2 M. & K. 365.

So a gift of property in a particular county or in a foreign country passes debts owing by persons living there. *Earl of Tyrone v. Marquis of Waterford*, 1 D. F. & J. 613 ; *Guthrie v. Walrond*, 22 Ch. D. 573.

So a gift of property at a bank was held to pass a cash balance, and also French inscribed rentes and railway shares, "nominatives" and "au porteur," the certificates for which were at the bank. *In re Prater* ; *Desinge v. Beare*, 37 Ch. D. 481.

And a gift of a desk "with the contents thereof" passes coin, bank-notes, a deposit receipt, cheques to the testator's order and promissory notes. *In re Robson* ; *Robson v. Hamilton*, (1891) 2 Ch. 559.

The devisee of land is entitled to the emblements, unless they are expressly given away, and a general residuary bequest is not sufficient for this purpose. *Cooper v. Woolfit*, 5 W. R. 790 ; 2 H. & N. 122 ; see *Blake v. Gibbs*, 5 Russ. 13, n. Emblements.

Under the term stock, growing crops will pass to the devisee of the land where they grow. *Blake v. Gibbs*, 5 Russ. 13, n. Farming stock.

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If the farm is devised to A and the stock to B, growing crops will pass to B whether the gift of the stock is coupled with the general personal estate or not. *Cox v. Godsalve*, 6 East, 604, n.; *West v. Moore*, 8 East, 339; *Rudge v. Winnall*, 12 B. 357; *In re Roose*; *Evans v. Williamson*, 17 Ch. D. 696, overruling *Vaisey v. Reynolds*, 5 Russ. 12; and see *Harrey v. Harrey*, 32 B. 441; *Creagh v. Creagh*, 13 Ir. Ch. 28; *Burbidge v. Burbidge*, 16 W. R. 76.

Live and dead stock.

As to live and dead stock, see *Hutchinson v. Smith*, 11 W. R. 417.

Business.

A direction to transfer a business to a son at twenty-one, has been held not to include a freehold shop where the business was conducted. *In re Henton*; *Henton v. Henton*, 30 W. R. 702; see *Deritt v. Kearney*, 13 L. R. Ir. 45.

Goodwill.

The term goodwill *prima facie* does not carry the freehold or leasehold premises where the business is carried on. But goodwill has been defined, as the "probability that the old customers will resort to the old place." Per Lord Eldon in *Cruttwell v. Lye*, 17 Ves. 335, 346. And goodwill may upon the context pass the business premises.

Thus a gift of plant and goodwill has been held to carry the leasehold business premises. *Blake v. Shaw*, Jo. 732.

Plant, business, and goodwill.

The expressions, "plant," and "business and goodwill," do not include stock in trade. *Blake v. Shaw*, Jo. 732; *Delany v. Delany*, 15 L. R. Ir. 55.

A gift of the testator's business and goodwill does not pass the capital in the business nor the book debts. *Delany v. Delany*, 15 L. R. Ir. 55.

Capital.

A gift of the testator's capital in a business includes a debt due from a partner. *Beran v. A.-G.*, 4 Giff. 361.

A gift of the testator's share right and interest in a partnership, does not pass a debt due to the testator from the partnership. *In re Beard*; *Simpson v. Beard*, 57 L. J. Ch. 887; 58 L. T. 629; 36 W. R. 519.

Share of business premises.

A gift of "all my share of the leasehold premises in which my business is carried on" where the testator was in partnership and the premises were vested in him and his partner as joint tenants, was held to pass only the interest of the testator,

if any, after paying the partnership debts. *Farquhar v. Hadden*, 7 Ch. 1. Chap. XVIII.

A bequest by a barge builder of his business and stock in trade, will pass old barges taken in part payment for new barges, and subsequently let out on hire. *Richardson v. Pilliner*, 50 L. J. Ch. 488. Stock in trade.

Upon the question whether a bequest of the stock in trade of a carriage builder will pass an unfinished carriage, see *Elliott v. Elliott*, 9 M. & W. 23.

For the meaning of the word patrimony, see *Green v. Giles*, 5 Ir. Ch. 25. Patrimony.

The word legacy is primarily applicable to personalty only. Legacy.

It does not apply to land given on trust for sale and division, but it does to a legacy charged on real estate. *White v. Lake*, 6 Eq. 188. *Hodges v. Grant*, 4 Eq. 140; see *In re King's Trust*, 29 L. R. Ir. 401.

But it may refer to realty if there is nothing else to which it can refer. *Hope d. Brown v. Taylor*, 1 Burr. 268; *Hardacre v. Nash*, 5 T. R. 716; see *Jackson v. Hosie*, 27 L. R. Ir. 450.

Similarly, the appointment of a residuary legatee will only give him personal property. *Windus v. Windus*, 21 B. 373; 6 D. M. & G. 549; *Hillas v. Hillas*, 10 Ir. Eq. 134; *Wills v. Wills*, 1 D. & War. 439; *Re Giles*, 14 Ir. Ch. 311; *Kellett v. Kellett*, 3 Dow, 248; *Cooney v. Nicholls*, 7 L. R. Ir. 107; *Gethin v. Allen*, 23 L. R. Ir. 236; *In re Morris*; *Morris v. Atherden*, 71 L. T. 179. Legatee.

But the appointment of a person "residuary legatee of all my property" will give him realty. *Warren v. Newton*, Drury, 464; *Day v. Davenport*, 12 Sim. 200; *Davenport v. Coltman*, 9 M. & W. 481; 12 Sim. 588. When the residuary legatee takes realty.

So, too, if the testator expresses an intention of disposing of all his real and personal estate, and then appoints a residuary legatee. *Pitman v. Sterens*, 15 East, 505.

Probably, if the testator, after making certain devises, appoints a residuary legatee, real estate would pass to him. At any rate, this is the case if the testator prefaces his will with the expression of an intention to dispose of his estate,

Chap. XVIII. which must mean his whole estate. *Hughes v. Pritchard*, 6 Ch. D. 24; *Re Salter*; *Farrant v. Carter*, 44 L. T. 603; see *In re Methuen & Blore's Contract*, 16 Ch. D. 696, where there was no previous devise of realty.

The testator may show that he includes realty in the residuary gift by a direction not to sell a house till the death of the tenant for life, on whose death the property becomes divisible among the residuary legatees. *Davenport v. Coltman*, 9 M. & W. 481.

When realty and personalty are made a mixed fund for the payment of legacies, it seems the residuary legatee will take everything that remains. *Evans v. Crosbie*, 15 Sim. 602; *Wildes v. Davies*, 1 Sm. & G. 475; see *post*, pp. 230-232.

So where there is an absolute direction to sell the testator's real estate and he disposes of the proceeds of his property, the appointment of a residuary legatee gives him the residue of the proceeds of sale of the realty. *Singleton v. Tomlinson*, 3 App. C. 404.

Annuities are legacies.

The word legacies include annuities. *Bromley v. Wright*, 7 Ha. 334; *Ward v. Grey*, 26 B. 485; *Mullins v. Smith*, 1 Dr. & S. 204; *Heath v. Weston*, 3 D. M. & G. 601; *Sibley v. Perry*, 7 Ves. 522.

And the term pecuniary legacies would also, it would seem, include annuities. *Gaskin v. Rogers*, L. R. 2 Eq. 284.

But if the testator expressly distinguishes between legatees and annuitants, legacies will not include annuities. *Gaskin v. Rogers*, *supra*; *Weldon v. Bradshaw*, 1 R. 7 Eq. 168.

It seems the term legacy does not *primâ facie* include a gift of residue, though legatee would include a residuary legatee. *Ward v. Grey*, 26 B. 485; see *In re Elcom*; *Layborn v. Grover Wright*, (1894) 1 Ch. 303; *In re Aiken*; *Bolon v. Gilliland*, (1898) 1 Ir. 335.

Manor.

The term manor comprises the demesne lands, including the waste of the manor and the freehold inheritance of the customary lands held of the manor, the services of freehold tenants of the manor, and the right to hold a Court Baron and a customary Court.

There may also be included in the manor certain franchises,

such as a Court leet, treasure trove, wreck of the sea, and the like. See Elton on Copyholds, p. 11. Chap. XVIII.

The term of course includes allotments made to the lord under an Inclosure Act in respect of his right in the soil. Such lands are already parcel of the manor, and the effect of the inclosure is only to free them from customary and prescriptive rights. *Hicks v. Sallitt*, 2 W. R. 173; 3 D. M. & G. 782; see, too, *Williams v. Phillips*, 8 Q. B. D. 437.

Further, the word manor includes copyhold tenements of the manor, purchased by the lord, though the lord's equitable title may not be perfect. *Hicks v. Sallitt*, *supra*.

Freehold lands held of the manor may again become parcel of the manor by escheat. *Delacherois v. Delacherois*, 13 W. R. 24; 11 H. L. 62.

But freehold lands held of the manor and purchased by the lord do not thereby become parcel of the manor, so as to pass by the description manor, though no doubt they might become parcel of the manor by reputation. *Delacherois v. Delacherois*, *supra*; *R. v. Duchess of Buccleuch*, 6 Mod. 151.

Manor does not include purchased freeholds.

A devise under a power, of the surface to A and the mines to B carries to A accumulations of rent down to the testator's death derived from the mines under a lease under the Settled Estates Act, the money being subject to investment in land under the Act. *In re Scarth*, 10 Ch. D. 499.

Rents from mines.

If an advowson is directed to be sold, and the proceeds invested for the benefit of a tenant for life, the tenant for life is entitled to present upon a vacancy occurring before sale. *Briggs v. Sharp*, 20 Eq. 317.

Advowson.

If the proceeds of sale are divisible among tenants in common, the right of presentation before the advowson is sold will be determined by lot. *Johnstone v. Baber*, 4 W. R. 827; 6 D. M. & G. 439.

A devise of hereditaments situate in A will not pass an advowson in gross, if there is property to which the devise may apply, unless an intention can be gathered from the instrument and the surrounding circumstances that the advowson was meant to pass. *Crompton v. Jarratt*, 30 Ch. D. 298, where the early cases, *Anon.*, 3 Dyer, 323 b, and *Kensey*

**Chap. XVIII.** *v. Langham*, Ca. t. Talb. 148, are discussed; *In re Hodgson; Taylor v. Hodgson*, (1898) 2 Ch. 545.

**Living.** The word living may mean the advowson or the next presentation. If the devise is coupled with words which contemplate personal enjoyment by the devisee, and there are no words of inheritance, the next presentation alone passes. *Webb v. Byng*, 4 W. R. 657; 2 K. & J. 669.

**Next presentation.** Under a devise of lands and hereditaments which include an advowson to trustees upon trust to pay the surplus rents and profits during a given period to a beneficiary, the beneficiary is entitled to nominate if a vacancy occurs during that period. *Earl of Albemarle v. Rogers*, 7 B. P. C. 522; *Cust v. Middleton*, 13 W. R. 249.

But a person entitled under a trust only to receive the rents of lands will not be entitled to present upon a vacancy occurring in a living which is included in the devise to the trustees. *Martin v. Martin*, 12 Sim. 579; see *Sherrard v. Lord Harborough*, Amb. 164.

**Land.** Though the word "land" is sufficient to pass land with buildings, it may be used in such a context as to exclude buildings.

Thus a devise of messuages and lands in A and all other lands, meadows and pastures in B does not pass houses in B, as the context shows that land is not used in its general sense. *Ewer v. Hayden*, Cro. El. 476, 658.

And a gift of "my cottage and all my land" at A will not include a house with ten acres of land at A subsequently purchased. *In re Portal & Lamb*, 30 Ch. D. 50.

**Proceeds of sale liable to reinvestment in land.**

Money arising from the sale of land and subject to a trust for reinvestment in land will pass under a devise of land; and as between a general devise of land and a devise of land in a particular county it passes under the former though the land sold was in that county. *In re Duke of Cleveland's Settled Estates*, (1898) 3 Ch. 244.

**Hereditaments.**

The expression hereditaments *primâ facie* means property capable of being inherited, but a direction to settle "the estates or other hereditaments" subject to a settlement has been held to include the proceeds of sale of some of the land

which were liable to reinvestment in land. *Basset v. St. Levan*, Chap. XVIII. 13 R. 235.

The word "farm" passes both freehold, copyhold, and Farm. leasehold portions of the farm unless there is a context excluding one or the other. *Lane v. Stanhope*, 6 T. R. 345; *Doe d. Belasyse v. Earl of Lucan*, 9 East, 448; *Arkell v. Fletcher*, 10 Sim. 299; *Holmes v. Sayer Milward*, 47 L. J. Ch. 522.

A devise of freehold land *prima facie* excludes leaseholds. Freehold. *Stone v. Greening*, 13 Sm. 390; *Hall v. Fisher*, 1 Coll. 47; *Emuss v. Smith*, 2 De G. & S. 722; see *In re Bright-Smith*; *Bright-Smith v. Bright-Smith*, 31 Ch. D. 314.

But a devise of freehold land in a particular parish, when the testator had only leaseholds there, has been held to pass the leaseholds. *Day v. Trig*, 1 P. W. 286; *Doe d. Dunning v. Cranstoun*, 7 M. & W. 1.

And this principle applies to wills executed since the Wills Act, under which freeholds acquired after the date of the will would pass. *Nelson v. Hopkins*, 21 L. J. Ch. 410.

And a devise of freehold land where the testator held, as to Freehold and leasehold interest. part, an underlease and the reversion in fee subject to the head lease, was held to pass the leasehold interest as well as the reversion, the intention being that the whole property was to go together to the devisee. *Mathews v. Mathews*, 4 Eq. 278; see *Vallance v. Vallance*, 2 N. R. 229.

On the other hand, where the testator was owner in fee of a house subject to a lease and also mortgagee of the lease, the mortgage debt was held not to pass by a devise of "my freehold house." *Bowen v. Barlow*, 11 Eq. 454; 8 Ch. 171; see *Wilkes v. Collin*, 8 Eq. 338.

A devise of freehold or leasehold ground rents passes the Ground rents. reversion. *Maundy v. Maundy*, 2 Stra. 1020; *Kaye v. Laxon*, 1 B. C. C. 76.

Where a testator forgave to a tenant "all rents or arrears Gift of rents. of rent which may be due and owing from him to me at the time of my decease," it was held that rent accrued since the last quarter day before the testator's death was not forgiven. *In re Lucas*; *Parish v. Hudson*, 55 L. J. Ch. 101; 54 L. T. 30.

**Chap. XVIII.** Where the devise is of rents due prior to the testator's death derived from property of which the testator is tenant for life, interest upon charges must be deducted, unless the charges are vested in the testator. *Lindsay v. Earl of Wicklow*, 1. R. 6 Eq. 72.

As to the effect of a gift of arrears of rents and profits to a specific devisee, subject to "outgoings properly chargeable against such arrears," see *In re Duke of Cleveland's Estate*; *Wolmer v. Forester*, (1894) 1 Ch. 164.

A devise of all the testator's interest in an estate when recovered will not carry rents accrued due prior to his death. *Scott v. Best*, 6 L. R. Ir. 1.

**Lessees.** A devise of the reversion of land subject to leases to the lessees or holders of present leases was held to include assignees of the leases. *King v. Rymill*, 78 L. T. 696.

**Messuage.** Under a devise of messuages in a particular parish freehold and leasehold messuages may pass together unless the limitations are only appropriate to freeholds or there is some other evidence of intention to exclude the leaseholds. *Thompson v. Lady Lawley*, 2 B. & P. 303; *Hobson v. Blackburn*, 1 M. & K. 571.

The term messuage or house will pass the orchard, garden and curtilage. Co. Litt. 5 b; *Carden v. Tuck*, Cro. El. 89; 3 Leon. 214, pl. 283; see *Lombe v. Stoughton*, 18 L. J. Ch. 100; *Heach v. Prichard*, W. N. 1882, 140.

It will also pass a piece of land or a cellar severed from the house, but near it and necessary for the convenient use of it. See *Hibon v. Hibon*, 11 W. R. 455; 32 L. J. Ch. 374; *Doe v. Collins*, 2 T. R. 498; *Steele v. Midland Ry. Co.*, L. R. 1 Ch. 275, 289.

**House.** If the testator in one part of his will gives a house and lands, and in another part uses the word house only, probably the latter devise would not carry land occupied with the house. *Buck d. Whalley v. Nurton*, 1 B. & P. 53; see 1 Bing. 498; *Roe d. Walker v. Walker*, 3 B. & P. 375.

"The leasehold premises, 32, Prince's Gate," has been held to pass stables held with the house under a separate lease. *Mocatta v. Mocatta*, 49 L. T. 629.



A devise of a house with its appurtenances probably has no wider meaning than a devise of a house alone. Such a devise will pass everything naturally belonging to the enjoyment of the house, such as a garden and orchard and a small piece of land occupied with the house. *Boocher v. Samford*, Cro. El. 118; *Doe d. Lemprière v. Martin*, 2 W. Bl. 1148; *Buck d. Whalley v. Nurton*, 1 B. & P. 53; see *Willis v. Watney*, 51 L. J. Ch. 181 (yards).

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Appur-  
tenances.

But land will not pass as appurtenant to a house or to other lands. See *Plowd.* 169 a, 170; *Co. Litt.* 121 b; *Hearn v. Allen*, Cro. Car. 57; *Lister v. Pickford*, 34 B. 576; see *Cuthbert v. Robinson*, 30 W. R. 366.

If the devise is of certain property with the lands appertaining or belonging thereto, this is not to be taken in the strict sense of appurtenant, but in the sense of usually occupied therewith. *Hill v. Grange*, 1 Plow. 170; *Dyer*, 130 b; *Ongley v. Chambers*, 1 Bing. 483; *Doe d. Gore v. Langton*, 2 B. & Ald. 680

Upon the construction of a complicated will a gift of the use and occupation of the testator's house was held to give a life interest only. *Coward v. Larkman*, 60 L. T. 1.

Use and  
occupation.

A gift of the use and occupation of a house does not involve a personal use so as to prevent the donee from letting. *Rabbeth v. Squire*, 4 De G. & J. 406; *Mannox v. Greener*, 14 Eq. 456.

But a gift over, if the donee ceases to occupy the house shows that the testator contemplated a personal use. *Maclaren v. Stainton*, 27 L. J. Ch. 442; 4 Jur. N. S. 199.

A provision that the testator's widow might reside rent free in his residence did not in cases not affected by the Settled Land Act enable her to let the house, but she might reside there from time to time without forfeiting her right. *May v. May*, 44 L. T. 412.

The effect of sect. 51 of the Settled Land Act upon such gifts will be found discussed under conditions requiring residence, *post*, p. 548.

A gift of the use of plate following a gift of other articles to the same legatee in absolute terms has been held a gift for life only. *Espinasse v. Luffingham*, 3 J. & L. 186.

Use of plate..

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For the meaning of a gift of the use of book debts and capital, see *Terry v. Terry*, 12 W. R. 66.

**Jointure.**

A jointure is *prima facie* an estate to the wife for life to take effect upon her husband's death, but it may take effect in the husband's life if there is a sufficient context to support that view. *Jamieson v. Trevelyan*, 10 Ex. 269; *In re De Hoghton*; *De Hoghton v. De Hoghton*, (1896) 2 Ch. 385.

**Devise of a house as occupied by A.**

A devise of a house as occupied by A will not pass a merely occasional easement enjoyed by A over other property of the testator, though the words "as enjoyed by A" might. *Polden v. Bastard*, L. R. 1 Q. B. 156; *Bodenham v. Pritchard*, 1 B. & C. 350; see *Taws v. Knowles*, (1891) 2 Q. B. 564.

**Right of way.**

Where a testator devises a piece of land to A, and another piece of land to B, and the only access to the latter is over the former, B is entitled to a right of way over A's land.

If the testator has himself used a certain way for purposes of access to B's land, that will be the way to which A is entitled. *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 761.

If no way can be said to have been used by the testator for the purpose of access to the land-locked land, it would seem that the owner of the servient tenement would be entitled to set out the way, subject to the restriction that taking all the circumstances into consideration it must be a reasonable way. See *Bolton v. Bolton*, 11 Ch. D. 968; and as to the user of the way, see *Corporation of London v. Riggs*, 13 Ch. D. 798.

**Right of light.**

On the same principle, where a testator devises to A a house with windows, and to B a field over which the light passes which is required for the windows, the right to the light over the field passes to A. *Phillips v. Low*, (1892) 1 Ch. 47.

**Premises.**

The proper legal meaning of "the premises" is *præmissa*, but it may be used in a popular sense as a description of certain property, as in the phrase house and premises; in such a case it will only include property in connection with the particular property mentioned. *Sanford v. Irby*, 4 L. J. Ch.

23; *Lethbridge v. Lethbridge*, 3 D. F. & J. 523; 4 *ib.* 35; Chap. XVIII. *Read v. Read*, 15 W. R. 165.

The word "moiety" may be used as equivalent to share. *Moiety. Morrow v. McConville*, 11 L. R. Ir. 236.

In a devise to the hospitals of London the expression London. London was held not to be confined to a definite area but to be used in a popular sense. *Wallace v. A.-G.*, 33 B. 384.

Testators sometimes give options of purchasing a part of their property. Such an option may be personal to the beneficiary or it may be transmissible. *Option to purchase. In re Cousins; Alexander v. Cross*, 30 Ch. D. 203.

If transmissible it must be so limited as not to transgress the rule against perpetuities.

The person to whom the option is given is entitled, if he exercises the option, to have the property free from incumbrances. *Given v. Massey*, 31 L. R. Ir. 126.

But he must comply strictly with the terms of the option, and if the option is to be exercised and the purchase-money paid within a given time, the option will be lost if this is not done, though there may be difficulties on the title or any other circumstance has caused delay. *Brooke v. Garrod*, 3 K. & J. 608; 2 De G. & J. 62.

If an offer is to be made by the executors and accepted within a given time, time does not run till a proper offer containing the terms is made. *Lord Lilford v. Powys Keck*, (No. 1) 30 B. 295; *Austin v. Tawney*, L. R. 2 Ch. 143.

It is a question to be determined on the facts of each case whether the person accepting the option is in the same position as an ordinary purchaser so that he may require an abstract of title or whether he must take the property as he finds it. See *Re Darison & Torrens*, 17 Ir. Ch. 7; *Given v. Massey; Brooke v. Garrod, supra.*

A right of purchase at a fixed price is not destroyed by a compulsory purchase under the Lands Clauses Act after the testator's death. In such a case the person to whom the option is given may take the purchase-money less the fixed price. *In re Cant's Estate*, 4 De G. & J. 503; *In re Kerry*, W. N. 1889, 3.

## Chap XVIII.

WORDS APPROPRIATE TO REALTY AND PERSONALTY  
RESPECTIVELY.Personal  
property.

1. Under the words *personal* property, estate, and effects, personal property alone passes. *Belaney v. Belaney*, L. R. 2 Eq. 210; 2 Ch. 138; *Jones v. Robinson*, 3 C. P. D. 344.

And possibly the word property would not pass realty if it is coupled with explanatory words relating only to personalty, such as "both in stock, household furniture, cash, &c., &c." *Mullaly v. Walsh*, 1. R. 6 C. L. 314; see 3 L. R. Ir. 244.

Words estate  
or property  
alone will pass  
realty,

2. The words estate or property alone are, however, sufficient to carry real estate. *Mayor of Hamilton v. Hodsdon*, 6 Moo. P. C. 76; 11 Jur. 193; *Hawksworth v. Hawksworth*, 27 B. 1; *In re Smart's Estate*; *Fox v. Shipman*, W. N. 1882, 77; *In re Heginbotham*; *Wilson v. Heginbotham*, W. N. 1884, 179.

where  
coupled with  
other words.

Where these words are coupled with other words which would alone be sufficient to carry the whole of the personal property, the word estate will, *primâ facie*, carry realty, as it would otherwise be insensible. *Tilley v. Simpson*, 2 T. R. 659, n.; *Edwards v. Barnes*, 2 Bing. N. C. 252; *Doe d. Walls v. Langlands*, 14 East, 370; *Jongsma v. Jongsma*, 1 Cox, 362; *Patterson v. Huddart*, 17 B. 210; *Hamilton v. Buckmaster*, L. R. 3 Eq. 323; *Sanderson v. Dobson*, 7 C. B. 81, and 10 B. 47, overruling same case, 1 Ex. 141; and see *Dobson v. Bowness*, 5 Eq. 404; *Loftus v. Stoney*, 17 Ir. Ch. 178.

If there are any words in the gift accurately applicable to realty, such as "devise," the fact that the trusts declared are only applicable to personalty will not prevent the real estate from passing. *Doe d. Burkitt v. Chapman*, 1 H. Bl. 23; *Dunnage v. White*, 1 J. & W. 583; *Stokes v. Salomons*, 9 Ha. 75; *Lloyd v. Lloyd*, 7 Eq. 458; *Longley v. Longley*, 13 Eq. 133.

Real estate will pass even if there are no words technically appropriate, and the trusts declared are not literally applicable to realty, if they can be held popularly applicable. *Saumarez v. Saumarez*, 4 M. & Cr. 331; *D'Almaine v. Moseley*, 1 Drew. 632; *Morrison v. Hoppe*, 4 De G. & S. 234.

Thus the words "collect and get in" will not prevent realty from passing. *Hamilton v. Buckmaster*, L. R. 3 Eq. 323. Chap. XVIII.

So, too, if the trust is for sale or investment, the inapplicability of the subsequent trusts to realty is immaterial. *O'Toole v. Browne*, 3 E. & B. 572; *Streatfield v. Cooper*, 27 B. 338; *Fullerton v. Martin*, 22 L. J. Ch. 893; *Dobson v. Bowness*, 5 Eq. 404. See, too, *Affleck v. James*, 17 Sim. 121. Trust for sale.

If, however, the gift is to trustees, their executors, administrators and assigns, on trusts exclusively applicable to personalty, real estate will not pass. *Doe d. Spearing v. Buckner*, 6 T. R. 610; *Pogson v. Thomas*, 6 Bing. N. C. 337; *Coard v. Holderness*, 20 B. 147.

It has sometimes been said, that if the words with which the word "estate" is coupled are not sufficient to carry all the personal property, estate will be confined to personalty. See *Tilley v. Simpson*, 2 T. R. 659, n.; *D'Almaine v. Moseley*, 1 Dr. 632. The rule appears, however, to be unsupported by actual decision, and has been disapproved of. See *Loftus v. Stoney*, 17 Ir. Ch. 178; *Re The Greenwich Hospital Improvement Act*, 20 B. 458. Estate coupled with words insufficient to pass personalty.

At any rate, where there is a prior devise of lands a gift of "the rest and residue of my estate," or "all other my estate," though coupled with words which would not alone carry all the personalty, will carry realty. *Scott v. Alberry*, Com. 337; 8 Vin. Abr. 229, pl. 14; *Fletcher v. Smiton*, 2 T. R. 656.

Of course where the testator shows that he uses the word estate as equivalent to effects, only personalty will pass. *Timewell v. Perkins*, 2 Atk. 102; *Doe d. Hurrell v. Hurrell*, 5 B. & Ald. 18.

3. The words "real estate" *primâ facie* do not include leaseholds, though leaseholds may pass if there is no real estate or an intention to include them can be gathered from the will. *Turner v. Turner*, 21 L. J. Ch. 843; *Gully v. Davis*, 10 Eq. 562; *Moase v. White*, 3 Ch. D. 763; *Butler v. Butler*, 28 Ch. D. 66; *Re Davison*; *Greenwell v. Davison*, 58 L. T. 304; *In re Uttermare*; *Leeson v. Foulis*, W. N. 1893, 158. Real estate.

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Seised.

4. A devise of "real estate of which I may die seised" will not pass lands which at the testator's death are in the wrongful possession of strangers. *Leach v. Jay*, 6 Ch. D. 496; 9 Ch. D. 42.

What I may  
die possessed  
of.

5. The words "whatever I may die possessed of" alone would probably carry realty.

At any rate this is clearly the case where they are coupled with words sufficient to carry the whole personalty. *Evans v. Jones*, 46 L. J. Ex. 280.

It makes no difference that the person to whom the gift is made is also appointed executor. *Pitman v. Stevens*, 15 East, 505; *Wilce v. Wilce*, 5 M. & P. 682; 7 Bing. 664; *Thomas v. Phelps*, 4 Russ. 348.

*Monk v. Maudsley*, 1 Sim. 286, and *Cook v. Jaggard*, L. R. 1 Ex. 125, were both cases before the Wills Act, in which the question was whether the words, "whatever I die possessed of," would pass the fee to a devisee to whom specific devises for life and in tail had already been made.

All the rest.

6. The words "all the rest," though following gifts of personalty, will pass realty. *Atree v. Atree*, 11 Eq. 280; *Smyth v. Smyth*, 8 Ch. D. 561.

Effects.

7. The word effects *primâ facie* will not pass real estate. *Doe v. Dring*, 9 Mau. & S. 448; *Doe d. Haw v. Earles*, 15 M. & W. 450; see, however, *Smyth v. Smyth*, *supra*; *A.-G. of British Honduras v. Bristowe*, 50 L. J. P. C. 15; *Hall v. Hall*, (1892) 1 Ch. 361.

But the testator may show that he intended realty to pass by the word effects, by referring, for instance, to property including realty as "such effects." *Marquis of Titchfield v. Horncastle*, 2 Jur. 610; *Milsome v. Long*, 3 Jur. N. S. 1073; see *In re Sheridan*, 17 L. R. Ir. 179.

The words "effects both real and personal" will pass realty. *Hogan v. Jackson*, 3 B. P. C. 388; Cowp. 299.

See, as to the meaning of effects, p. 180.

Chattels.

8. On the other hand, chattels real and personal *primâ facie* will not, unless explained by the context. *Grayson v. Atkinson*, 1 Wils. 333.

9. The expression "worldly goods of what nature and kind soever" passes realty. *Wright v. Shelton*, 18 Jur. 445. Chap. XVIII.  
Worldly goods.

10. The appointment of a person executor of the testator's property has been held sufficient to give him the fee in real estate. *Doe d. Hickman v. Haslewood*, 6 A. & E. 167; *Doe d. Pratt v. Pratt*, *ib.* 180; *Murphy v. Donelly*, 1. R. 4 Eq. 111. Appointment  
of executor.

## CHAPTER XIX.

### RESIDUARY GIFTS.

#### I. RESIDUARY DEVISES OF LAND.

##### A. *Freeholds.*

#### **Chap. XIX.**

Operation of  
a general  
devise on  
freeholds  
before the  
Wills Act.

IN wills, prior to the Wills Act, a residuary devise included only lands possessed by the testator at the date of his will, and of which he had not attempted to make any disposition by his will.

It included, therefore, the reversion in lands in which partial interests only had been previously given. *Rooke v. Rooke*, 2 Vern. 461; 1 Eq. Ab. 210, pl. 17; *White v. Vitty*, 2 Russ. 484; 4 Russ. 584.

And in the case of contingent and executory devises it included the interest undisposed of in the event of those devises not taking effect, or until they took effect, but not lapsed or void devises. *Doe d. Wells v. Scott*, 3 Mau. & S. 300; *Egerton v. Massey*, 3 C. B. N. S. 338.

And a gift of the residue of the proceeds of sale of realty devised on trust for sale was subject to the same rule and did not carry legacies given out of the proceeds which failed through lapse or otherwise. *Hutcheson v. Hammond*, 3 B. C. C. 128; *Jones v. Mitchell*, 1 S. & St. 290.

Now by sect. 25 of the Wills Act, real estate comprised in any devise which shall fail or be void shall be included in a residuary devise.

##### B. *Reversions.*

Reversions  
pass under  
a general  
devise.

1. Reversions, whether vested in the testator at the time of making his will or remaining in him after the limitations of



his will are exhausted, pass by a general devise of lands. *Chester v. Chester*, 3 P. W. 56; *Doe d. Moreton v. Fossick*, 1 B. & Ad. 186; *Mostyn v. Champneys*, 1 Scott, 298; 1 Bing. N. C. 341.

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2. A devise of lands not settled, or out of settlement, is equivalent to a devise of lands not otherwise disposed of, over which the testator has absolute dominion, and will therefore pass a reversion in fee in settled lands, though the testator may confirm the settlement. *Incorporated Society v. Richards*, 1 Dr. & War. 258; *Cooke v. Gerrard*, 1 Lev. 212; *Strode v. Russell*, 2 Vern. 621; *Chester v. Chester*, 3 P. W. 56; *A.-G. v. Vigor*, 8 Ves. 256; *Jones v. Skinner*, 5 L. J. Ch. 87; *Kelly v. Duffy*, 4 L. R. Ir. 601; see *In re Green*; *Walsh v. Green*, 31 L. R. Ir. 938.

Devise of lands not settled includes a reversion in settled lands,

A charge of annuities upon the lands passing by the general words will not exclude reversions. *Doe d. Moreton v. Fossick*, 1 B. & Ad. 186; *Doe d. Pell v. Jeyes*, 1 B. & Ad. 598.

3. The fact that the limitations on which the reversion is dependent are such that some of the limitations of the will cannot take effect upon the reversion, will not prevent the reversion from passing.

though some of the limitations are inappropriate to the reversion.

If there are other lands besides the reversion the limitations inapplicable to the reversion will be referred to the other lands *reddendo singula singulis*. *Doe d. Earl Cholmondeley v. Weatherby*, 11 East, 322; *William d. Hughes v. Thomas*, 12 East, 141; *Freeman v. Duke of Chandos*, Cowp. 363; *Doe d. Nethercote v. Bartle*, 5 B. & Ald. 492; *Morris v. Lloyd*, 33 L. J. Ex. 202.

And under this head would come all wills since the Wills Act, where such of the limitations as can never take effect upon the reversion may be looked upon as intended to operate upon after-acquired lands.

And even if there are no other lands the reversion will pass if some of the limitations of the will are applicable to it. *Church v. Mundy*, 12 Ves. 426; *Tennent v. Tennent*, Dru. temp. Sugden, 161; 1 Jo. & Lat. 379; *Ford v. Ford*, 6 Ha. 486; *Roe d. James v. Aris*, 4 T. R. 605; *Jacob v. Jacob*, 78 L. T. 451, 825, see 82 L. T. 270; *Goodtitle d. Daniel v. Miles*, 6 East, 494, must be considered overruled.

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Whether a reversion passes if all the limitations are inappropriate.

4. If, however, none of the limitations of the will could take effect upon the reversion, there seems no reason for supposing the reversion would pass. *Tennent v. Tennent, supra*, is not *contra*, since the devise of the reversion was capable of taking effect so far as the life interest given to R. was concerned. *Goodtitle d. Daniel v. Miles, supra*, seems to have been decided upon this principle, though the facts did not justify its application.

5. And, of course, the reversion will not pass if the testator expressly treats it as undisposed of by his will; if, for instance, he treats the estates in which he has a reversion as descendible on failure of the prior limitations. *Strong v. Teutt*, 2 Burr. 912; 3 B. P. C. 219.

**C. Leaseholds for Lives.**

Leaseholds for lives.

The same rules are applicable to leaseholds for lives, which, being freehold interests, pass under a general devise though some of the limitations are inapplicable. *Fitzroy v. Howard*, 8 Russ. 225; *Weigall v. Broome*, 6 Sim. 99.

**D. Copyholds.**

Copyholds.

By 55 Geo. III. c. 192, and sects. 3, 4 of the Wills Act, copyholds, whether surrendered to the use of the will or not, pass by a general devise. *Doe d. Clarke v. Ludlam*, 7 Bing. 275; 5 Moo. & P. 48.

The effect of sect. 3 of the Wills Act is only to dispense with the necessity for a surrender, and not to convey the estate into the devisee without admission. The estate therefore remains in the customary heir till admittance. *Garland v. Mead*, L. R. 6 Q. B. 441.

Equitable estates in copyholds.

Before 55 Geo. III. c. 192, equitable estates of copyholds which could not be surrendered could be devised by words of direct reference. *Allen v. Poulton*, 1 Ves. Sen. 121; but they did not pass by a general devise of lands; but now, as the evidence of intention to pass copyholds inferred from a surrender is unnecessary, it seems they would pass under a general devise.

See per Lord Cranworth, in *Torre v. Browne*, 5 H. L. Chap. XIX.  
555, 474.

And by the effect of sect. 8 of the Wills Act, a general devise of lands will pass copyholds, freed from the widow's right to freebench, in cases where the right could have been barred prior to the passing of that section by a surrender. *Lacey v. Hill*, 19 Eq. 346.

### E. *Leaseholds for Years.*

#### a. *Before the Wills Act.*

A general devise of lands before the Wills Act did not carry leaseholds for years if there were any freeholds; on the other hand, if there were no freeholds, leaseholds might pass. *Rose v. Bartlett*, Cro. Car. 292; *Thompson v. Lawley*, 2 B. & P. 308; *Gully v. Davis*, 10 Eq. 562.

Leaseholds  
for years  
before the  
Wills Act.

But leaseholds passed under a gift of lands or of real estate, if there were any words applicable to them, or an intention could be gathered from the will that they were to be included. Thus leaseholds passed under the description lands which the testator "then stood seised or possessed of, or any ways interested in." *Addis v. Clement*, 2 P. W. 456.

Words of  
description  
applicable to  
leaseholds.

The word "possessed" was considered the important word, and leaseholds did not pass under a similar devise without the word possessed. *Pistol v. Riccardson*, 2 P. W. 459, n.; *Davis v. Gibbs*, 3 P. W. 26.

And leaseholds passed where the devise was subject to ground rents or to certain persons to hold for ever, or otherwise according to the natures and tenures thereof. *Hartley v. Hurle*, 5 Ves. 540; *Swift v. Swift*, 1 D. F. & J. 160.

The same result followed if the lands were described by acreage, which could only be satisfied by including leaseholds. *Goodman v. Edwards*, 2 M. & K. 759.

#### b. *Since the Wills Act.*

Sect. 26 of the Wills Act enacts that a devise of the land of the testator, or of the land of the testator in any place or in

S. 26 of the  
Wills Act.

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the occupation of any person mentioned in his will or otherwise described in a general manner and any other general devise, which would describe a customary copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates or any of them to which such description shall extend as the case may be as well as freehold estates unless a contrary intention shall appear by the will.

The section was probably intended to do no more than to abolish the rule established by *Rose v. Bartlett*, and other cases, and to leave the Court to ascertain the testator's intention unfettered by technical rules. See *Butler v. Butler*, 28 Ch. D. 75; *Re Davison*; *Greenwell v. Davison*, 58 L. T. 304.

The section is not limited to a devise of "land," but applies to any general devise. As to its application to a devise of "real estate" see *Butler v. Butler*, 28 Ch. D. 75; *Re Davison*; *Greenwell v. Davison*, 58 L. T. 304, and see p. 193.

Contrary  
intention.

A contrary intention within the meaning of sect. 26 is not shown by the fact that the "lands" in question are devised in strict settlement without any provision to prevent the leaseholds from vesting indefeasibly in the first tenant in tail at his birth. *Wilson v. Eden*, 11 B. 237; 5 Ex. 752; 14 B. 317; 18 Q. B. 474; 16 B. 153.

But if there is a direction to accumulate the rents and profits during the minority of a tenant for life or in tail, and if he attains twenty-one to pay the accumulations to him, or if he dies under twenty-one to invest them in freehold land, to be settled to the same uses—a direction inconsistent with the absolute vesting of the leaseholds in a tenant in tail at birth—and a power of selling the "lands" and investing the proceeds in leaseholds, to be settled upon the same trusts, but so that they shall not vest in any tenant in tail dying under twenty-one, and there is a gift of the residuary personal estate upon trusts corresponding with the uses of the devised lands with the same proviso against absolute vesting, the testator by the provisions against the vesting of leaseholds in any tenant in tail dying under twenty-one shows that he would have inserted

similar provisions in the devise of the “lands,” unless he had intended leaseholds not to pass under that name. *Prescott v. Barker*, 9 Ch. 174. Chap. XIX.

#### F. *Beneficial Interest in a Mortgage.*

A general or specific devise of lands will not without more pass the beneficial interest in a mortgage. *Strode v. Russell*, 2 Vern. 621, 624; *Casborne v. Scarfe*, 1 Atk. 605; see 2 J. & W. 194. See *Martin d. Weston v. Mowlin*, 2 Burr. 969, where the testator was mortgagee in possession; *In re Clowes*, (1893) 1 Ch. 214. Beneficial interest in a mortgage.

But a devise of particular lands of which the testator is only mortgagee to several persons in succession, may pass the beneficial interest, as something was clearly intended to pass, and the limitations are inappropriate to a devise of the mere legal estate. *Woodhouse v. Meredith*, 1 Mer. 450. See, too, *Knollys v. Shepherd*, 1 J. & W. 499; *Clarke v. Abbott*, Barn. Ch. 457, 461; *In re Clowes*, (1893) 1 Ch. 214; *In re Carter*; *Dodds v. Pearson*, (1900) 1 Ch. 801.

And a devise of the testator's estate and interest in certain lands may pass the lands and also mortgages or charges on the land to which he is entitled. *Mackesy v. Mackesy*, (1896) 1 Ir. 511; *Kilkelly v. Powell*, (1897) 1 Ir. 457.

#### G. *Trust and Mortgage Estates.*

By sect. 30 of the Conveyancing and Law of Property Act, 1881, which applies to persons dying after the 31st of December, 1881, trust and mortgage estates vest in the personal representatives from time to time of the deceased, notwithstanding any testamentary disposition. Trust and mortgage estates.

The section applies to copyholds. *Re Hughes*, W. N. 1884, 53.

Sect. 45 of the Copyhold Act, 1887 (50 & 51 Vict. c. 79), which became law on the 16th September, 1887, enacted that sect. 30 of the Conveyancing and Law of Property Act, 1881, should not apply to land of copyhold or customary tenure vested in the tenant on the Court rolls of any manor upon any trust, or by way of mortgage. Trust copyholds of inheritance not to descend as chattels real.

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The effect of this section was considered in *In re Mills' Trusts*, 37 Ch. D. 312 ; 40 Ch. D. 14.

The Copyhold Act, 1887, is repealed by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), but sect. 45 of the Act of 1887 is re-enacted by sect. 88 of the Act of 1894.

In cases where the Conveyancing Act does not apply the following propositions are deducible from the cases :—

Legal estate  
in trust and  
mortgage  
estates.

A general devise to a person absolutely without more will pass the legal estate in property of which the testator is trustee or mortgagee. *Lord Braybrooke v. Inskip*, 8 Ves. 417.

There is, however, a distinction between cases where the testator is mortgagee in trust, and where he is also beneficially entitled to the mortgage money.

Where the  
testator is  
mortgagee  
and bene-  
ficially en-  
titled to the  
mortgage  
money.

1. Where the testator has the legal estate in a mortgage, and the beneficial interest is also vested in him, the legal estate passes under a gift of "all the rest of my real and personal estate to A for her own use and benefit," though there may be a charge of debts. *Re Sterens' Will*, 6 Eq. 597. In such a case it is reasonable to suppose that the beneficial ownership and the legal estate were meant to go together.

If the devise is to *trustees*, subject to a charge of debts, apparently the legal estate would not pass, the argument from the convenience of uniting the legal estate with the beneficial interest being away. *Re Horsfell*, M'C. & Y. 292.

This is *à fortiori* the case where the devise is to trustees subject to the payment of debts upon trusts inapplicable to the legal estate. See *Packman v. Moss*, 1 Ch. D. 215, where the testator was beneficially interested in a moiety of the equity of redemption.

But if the trustees are directed to get in debts due on any security, they take the legal estate. *Re Arrowsmith's Trusts*, 6 W. R. 642.

The legal estate will not pass where the devise is after payment of debts to two persons as tenants in common (a) ; or where it is to several persons in definite shares, though not subject to debts (b) ; or where it is to an indefinite class, as tenants in common (c). *Doed. Roylance v. Lightfoot*, 8 M. & W. 553 (a) ; *Martin v. Laverton*, 9 Eq. 563 (b) ; *Re Finney's Estate*, 3 Giff. 465 (c).

2. Mere trust estates will not be prevented from passing under a general devise by words of benefit superadded. *Bainbridge v. Lord Ashburton*, 2 Y. & C. Ex. 347; *Sharpe v. Sharpe*, 12 Jur. 398; *Lewis v. Mathews*, L. R. 2 Eq. 177; and see *Ex parte Shaw*, 8 Sim. 159. Chap. XIX.

Mere trust estates.

But they will not pass if there is a charge of debts, whether by express words or by implication from a residuary devise where legacies have been previously given (a); nor if the devise is on trust for sale (b); or to uses in strict settlement (c). *Doe d. Reade v. Reade*, 8 T. R. 118; *Duke of Leeds v. Munday*, 3 Ves. 348; *Hope v. Liddell*, 21 B. 183; *In re Bellis' Trusts*, 5 Ch. D. 504; see, however, *In re Brown & Sibly*, 3 Ch. D. 156 (a); *Ex parte Marshall*, 9 Sim. 555; *Re Cantley or Cautley*, 17 Jur. 124; 22 L. J. Ch. 391; *Morley's Will*, 10 Ha. 293; *In re Smith's Estate*, 4 Ch. D. 70 (b); *Thompson v. Grant*, 4 Mad. 438 (c). Charge of debts, trust for sale, uses in strict settlement.

As to whether a devise to the separate use will prevent trust estates from passing, see *Lindsell v. Thacker*, 12 Sim. 178. Separate use.

3. Where a testator has contracted to sell real estate, so that he is a constructive trustee of the legal estate, it will pass under a devise of trust estates, and not under a general devise upon trust for sale. *Lysaght v. Edwards*, 2 Ch. D. 499. *Purser v. Darby*, 4 K. & J. 41, only decides that where the estate contracted to be sold is specifically devised it is excepted from a general devise of trust estates. Constructive trust.

If there is no devise of trust estates, the legal estate in lands contracted to be sold will pass under a general devise of real and personal estate upon trust to get in and dispose of the personalty, the legal estate being required for the purpose of the trust. *Wall v. Bright*, 1 J. & W. 494; *Lysaght v. Edwards*, 2 Ch. D. 499, 515.

But it will not if the devise is to tenants in common with limitations over. *Thirtle v. Vaughan*, 24 L. T. 5; 2 W. R. 632.

A devise of mortgaged estates on trust to get in the mortgage debts will not pass a legal estate which has descended to the testator as heir of a deceased mortgagee. *Ex parte Morgan*, 10 Ves. 100.

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## II. RESIDUARY BEQUESTS.

A. *What is a Residuary Gift.*

No particular words necessary to pass the residue.

Such words as goods, chattels, or effects will, as a rule, pass the residuary personalty; no particular words are, however, necessary for that purpose. *Blund v. Lamb*, 2 J. & W. 399; *Hearne v. Wigginton*, 6 Mad. 120; *Fleming v. Burrows*, 1 Russ. 276; *Leighton v. Baillie*, 3 M. & K. 267; *In re Bassett's Estate*; *Perkins v. Fladgate*, 14 Eq. 54; see *In bonis Aston*, 6 P. D. 203.

Doctrine of *ejusdem generis*.

The question frequently arises, whether words in themselves large enough to pass the residue, but coupled with an enumeration of particular things, will be cut down to pass only things *ejusdem generis* with those enumerated.

Enumeration of particulars followed by *et cætera*.

With regard to the meaning of *et cætera* following an enumeration of specific things, no precise rule can be laid down. The tendency of the most recent cases is to give the word the widest possible meaning, so that it would pass even real estate. *Chapman v. Chapman*, 4 Ch. D. 800; *Mullally v. Walsh*, 3 L. R. Ir. 244.

On the other hand, in some of the earlier cases *et cætera* following an enumeration of particulars has been confined to things *ejusdem generis*. *Marquis of Hertford v. Lowther*, 7 B. 1; *Newman v. Newman*, 26 B. 220; *Barnaby v. Tassell*, 11 Eq. 363.

Large words followed by an enumeration of particulars.

Where there are comprehensive words followed by an enumeration of particulars, an *et cætera* will not restrict the meaning of the large words. *Kendall v. Kendall*, 4 Russ. 360; *Gorer v. Davis*, 29 B. 222.

Large words, such as goods, chattels, or effects, when they are followed by an enumeration of particulars, will not be limited to things *ejusdem generis*. *Fisher v. Hepburn*, 14 B. 627; *Patterson v. Huddart*, 17 B. 210; *Ellis v. Selby*, 7 Sim. 352; 1 M. & Cr. 286; *Swinfen v. Swinfen*, 29 B. 207; *Arison v. Simpson*, Jo. 43.

Explanatory words.

The same is the case though the particulars are introduced by words intended to be explanatory of the former words, for



instance, "namely," "consisting in," "together with," "such as," "both in," or similar words. *Bridges v. Bridges*, 8 Vin. Abr. Devise, 295, pl. 13; *Gover v. Davis*, 29 B. 222; *In bonis Goodyar*, 1 Sw. & Tr. 127; 4 Jur. N. S. 1243; *Mahony v. Donovan*, 14 Ir. Ch. 262, 388; *Drake v. Martin*, 23 B. 89; *Dean v. Gibson*, 3 Eq. 713; *Maberley's Trusts*, 19 W. R. 522; *King v. George*, 4 Ch. D. 435; 5 *ib.* 627; *In re Fleetwood*; *Sidgreaves v. Brewer*, 15 Ch. D. 594; *Mullally v. Walsh*, 3 L. R. Ir. 244; see *Kendall's Trust*, 14 B. 608; *Tighe v. Fetherstonhaugh*, 13 L. R. Ir. 401. *Timewell v. Perkins*, 2 Atk. 103, is not to be followed.

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And the words "whether in money or in the public funds or other securities of any sort or kind whatsoever," have an enlarging rather than a restrictive force, so far as personal property is concerned. *Cambridge v. Rous*, 8 Ves. 12; see *Reeves v. Baker*, 18 B. 372.

So, where a testator gave his wife "all my property, leasehold and freehold, which I now possess," it was held that "leasehold and freehold" was added *ex abundanti cautela* and not to restrain the generality of the word "property." *Re Roberts*; *Kiff v. Roberts*, 55 L. J. Ch. 628; 54 L. T. 386; 55 L. T. 498; 35 W. R. 176.

On the other hand, a gift of all the testator's property in certain securities is a gift of those securities only. *Enohin v. Wylie*, 1 D. F. & J. 410; 10 H. L. 1.

Property in certain securities.

But such a gift may be enlarged to a residuary gift, if the testator goes on to state, that it is his intention to dispose of all his property among the legatees in question. *Patrick v. Yeatherd*, 12 W. R. 304.

It seems that the express inclusion in the large words of some particular property, which would have passed without being expressly included, affords an argument for excluding from the gift things *ejusdem generis* with that included. *Steignes v. Steignes*, Mos. 296.

Express inclusion of things which would have passed without mention.

General words following an enumeration of particulars will *primâ facie* have their full force whether introduced by the word "other" or not, if a restricted construction would cause an intestacy. *Arnold v. Arnold*, 2 M. & K. 365; *Swinfen v.*

Enumeration of particulars preceding large words will not restrict the latter.

Chap. XIX. *Swinfen*, 29 B. 207; *Campbell v. Prescott*, 15 Ves. 503; *Michell v. Michell*, 5 Mad. 69; *Martin v. Glover*, 1 Coll. 269; *Parker v. Marchant*, 1 Y. & C. C. 290; *Nugee v. Chapman*, 29 B. 290; *Hodgson v. Jex*, 2 Ch. D. 122; see, too, *Re Lloyd's Estate*, 2 Jur. N. S. 539; *Everall v. Browne*, 1 Sm. & G. 368; *In bonis Jupp*, (1891) P. 300; *Anderson v. Anderson*, (1895) 1 Q. B. 749.

The fact that specific and general legacies are given in later parts of the will is not sufficient to restrict the general words. *In bonis Shephard*, 48 L. J. P. 62.

It is immaterial that certain things which would have passed under the previous words, if read in their large sense, are subsequently given to the same legatee. *Bennett v. Batchelor*, 1 Ves. Jun. 68; 3 B. C. C. 27; *Fleming v. Burrows*, 1 Russ. 276.

It makes no difference, that the gift is not strictly residuary, so that there might possibly be property which it would be ineffectual to pass. *Hodgson v. Jex*, 2 Ch. D. 122.

The word article, however, has not the same large sense as goods or effects. *Collier v. Squire*, 3 Russ. 467.

But if it is clear that the gift was not meant to be residuary, and the large words, if not confined to things *ejusdem generis*, would carry the residue, they must be so confined.

1. This is the case, if there is an express residuary gift. *Woolcomb v. Woolcomb*, 3 P. W. 112; *Stuart v. Marquis of Bute*, 1 Dow, 84; *Lamphier v. Despard*, 2 Dr. & War. 59; *Mullins v. Smith*, 1 Dr. & Sm. 204; *Campbell v. M'Grain*, I. R. 9 Eq. 397; *Waite v. Morland*, 13 W. R. 963; *Smith v. Davis*, 14 W. R. 942.

2. So when the residue has been given and the will is then revoked so far as relates to the bequest to the residuary legatee of the testatrix's plate, linen, household goods, and other effects, these words would be confined to things *ejusdem generis*. *Hotham v. Sutton*, 15 Ves. 319.

If, however, the revocation is of the same enumerated things and "other effects (except money)," the testatrix shows that she considered things not *ejusdem generis* would be included, and the large words will have their full force. *Hotham v. Sutton*, 15 Ves. 326; *Iverson v. Gassiot*, 3 D. M. & G. 958; see

Large words  
confined to  
things *ejusdem*  
*generis*,

if there is  
another  
residuary gift,

or it is clear  
that the gift  
in question  
was not  
meant to be  
residuary.

*Steignes v. Steignes*, Mos. 296. *Fleming v. Brook*, 1 Sch. & Lef. 818, is inconsistent with *Hotham v. Sutton*.

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So, too, if something stated to be a portion of certain specific property, together with the testator's household furniture and effects of what nature or kind soever, is given to a legatee, and the testator then makes other gifts, the earlier gift being clearly not residuary will only pass things *ejusdem generis* with those enumerated. *Rawlings v. Jennings* 18 Ves. 89.

And it would seem that where there is a gift of certain articles and all other goods of whatever kind to a legatee at the commencement of a will, followed by dispositions of other portions of the testator's property, and the remainder of the latter property is given to the same legatee, it is clear that the first gift was not meant to be residuary. *Wrench v. Jutting*, 3 B. 521.

So, too, a gift of the remainder of the testator's money and effects to be expended in purchasing a suitable present for his godson must be read as limited to things *ejusdem generis* with money. *Borton v. Dunbar*, 1 Giff. 221; 2 D. F. & J. 388; 30 L. J. Ch. 8.

3. Or, again, the testator may show by subsequent reference or explanation that he meant only things *ejusdem generis* to pass. *Sutton v. Sharp*, 1 Russ. 149; see *A.-G. v. Wiltshire*, 16 Sim. 38.

In the case of a bequest of things in a house where the house is also given to the legatee, general words following an enumeration of particulars will more readily be limited so as to pass only things *ejusdem generis*.

Bequest of things in a house.

The mention of one particular class of things, coupled with general words, will not cut down the general words.

Thus, under a bequest of furniture and other moveable goods in a house, money will pass. *Swinfen v. Swinfen*, 29 B. 207; *Mahony v. Donoran*, 14 Ir. Ch. 262, 388; *Cole v. Fitzgerald*, 3 Russ. 301.

On the other hand, if there is a long enumeration of particulars, such as furniture, plate, linen, and the like, followed by general words, the general words will be confined to things

Chap. XIX. *ejusdem generis*; so that, for instance, money in the house would not pass. *Trafford v. Berrige*, 1 Eq. Ab. 201, pl. 4; *Boon v. Cornforth*, 2 Ves. Sen. 278; *Campbell v. M'Grain*, 1 R. 9 Eq. 397; *Watson v. Arundel*, 1 R. 10 Eq. 299; see *Dutton v. Hockenhull*, 22 W. R. 701.

The argument in favour of a restricted construction of the general words is strengthened, if there is anything to show that the testator intended the chattels in question to be enjoyed with the house. *Gibbs v. Laurence*, 7 Jur. N. S. 137; 30 L. J. Ch. 171; *Bradish v. Ellames*, 13 W. R. 128; 10 Jur. N. S. 1170, 1231.

The same is the case, if the things given are annexed to the house as heirlooms, a term implying durability. *Hare v. Pryce*, 12 W. R. 1072; *Fitzgerald v. Field*, 1 Russ. 427.

And in a similar gift the fact that a pecuniary legacy is given to the same legatee will prevent money in the house from passing as goods and chattels. *Roberts v. Kuffin*, 2 Atk. 113; *Anon.*, Prec. Ch. 8. See *In re Robson*; *Robson v. Hamilton*, (1891) 2 Ch. 559. See, too, *ante*, p. 181.

### B. What passes under a Residuary Gift.

Residue distinguished.

Gifts of residue may be either gifts of the residue of a particular fund or they may be general residuary gifts. Gifts of the residue of a particular fund may be either gifts of the residue of a fund over which the testator has a power of appointment, or of a fund created by the testator for the purposes of his will.

1. As to the residue of an appointed fund:—

Residue of appointed fund.

A gift of the residue of a fund over which the testator has a power of appointment, if not specific (see *ante*, p. 131), passes shares in the fund the gift of which lapses or fails. *Falkner v. Butler*, Amb. 514; *Oke v. Heath*, 1 Ves. Sen. 134.

This is the case, though the share in question may be directed to fall into the residue in certain events, which do not happen. *In re Meredith's Trusts*, 3 Ch. D. 757.

Residue "after payment" of legacies.

It appears to be immaterial that the residue is given only after deducting or after payment of the sums already appointed.

*Falkner v. Butler*, Amb. 514; *Carter v. Taggart*, 16 Sim. 423; *In re Harries' Trust*, Joh. 199. Chap. XIX.

If the gift of the residue is specific but is appointed subject to charges not within the power, the charges sink into the residue. *In re Jeaffreson*, L. R. 2 Eq. 276; *Douglass v. Waddell*, 17 L. R. Ir. 384.

2. As to the residue of a particular portion of the testator's own property :—

Residue of specific part of testator's own property.

Where a testator disposes of part of his lands in a particular parish, or of part of his freehold lands to A and devises the residue of those lands to B, the devise to B is specific, and will not carry a lapsed share. *In re Brown's Trusts*, 1 K. & J. 522; *Springett v. Jennings*, 6 Ch. 333; *In re Mason*; *Ogden v. Mason*, 48 W. 493.

In the case of personalty, where the testator cannot be supposed to have in his mind the distinct portions of which the property is composed, different rules apply. Thus, if he disposes of a particular portion of his personalty, and then gives the residue of that portion, whether it is described as residue not otherwise disposed of or after payment of the sums previously given, the particular residue passes shares in the property which lapse or are invalidly given. *De Trafford v. Tempest*, 21 B. 564; *Aston v. Wood*, 43 L. J. Ch. 715; *Champney v. Dary*, 11 Ch. D. 949; *In re Larking*; *Larking v. Larking*, 37 Ch. D. 310; *Langan v. Bergin*, (1896) 1 Ir. 331.

Residue fund of personalty.

A gift of particular residue “not specifically bequeathed” will not carry lapsed portions of the property, if there is a general residuary bequest, though the latter may be given with precisely the same words. *Patching v. Barnett*, 28 W. R. 886, 890; but see *M'Kay v. M'Kay*, (1900) 1 Ir. 213.

Upon the question whether a gift of a residue is a gift of the general residue or only of the residue of a particular fund, see *Ommaney v. Butcher*, T. & R. 260; *Legge v. Asgill*, *ib.* 265, n.; *Wrench v. Jutting*, 3 B. 521; *Boys v. Morgan*, 9 Sim. 289; 3 M. & Cr. 661; *Markham v. Ivatt*, 20 B. 579; *Jull v. Jacobs*, 3 Ch. D. 703.

General residue and residue of a particular fund.

3. As to a general residue :—

A general residuary gift passes everything not disposed of, T. W.

General residuary gift.

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whether the testator has not attempted to dispose of it, or whether the disposition fails by lapse or any other event. *Bernard v. Minshull*, Johns. 276; *In re Bagot*; *Paton v. Ormerod*, (1893) 3 Ch. 348.

It also passes property attempted to be appointed. *Spooner's Trust*, 2 Sim. N. S. 129.

And a gift of general residue "not otherwise disposed of," or "not herein specifically bequeathed," will pass property not effectually disposed of. *Green v. Dunn*, 20 B. 6; *De Trafford v. Tempest*, 21 B. 564; *Patching v. Barnett*, 28 W. R. 886, 890.

A residuary gift has even been held to include property directed to be considered as part of the testator's personal estate, and to go in a due course of administration. *Scott v. Moore*, 14 Sim. 53.

Under a residuary devise, from which the testatrix excepted the lands subject to the uses of her marriage settlement, under which she took an ultimate remainder in fee, it was held that the remainder in fee in lands conveyed to the uses of the settlement subsequently to the date of the will passed. *Hughes v. Jones*, 11 W. R. 898; see *Torrens v. Millington*, 26 W. R. 753.

Recital of  
settlement.

A recital by the testator in his will that certain property is settled in a particular manner, though it is not so settled, does not prevent the property from passing under a gift of residue. *In re Bagot*; *Paton v. Ormerod*, (1893) 3 Ch. 348, overruling, as far as *contra*, *Circuit v. Perry*, 23 B. 275; *Harris v. Harris*, I. R. 3 Eq. 610; *Hawks v. Longridge*, 29 L. T. 449; *Clibborn v. Clibborn*, 9 Ir. Jur. 381.

Residue  
limited by  
restrictive  
words.

The terms in which the residue is given may exclude certain property from it.

Thus, if the testator declares his intention of disposing of certain property by codicil, a gift of residue "not reserved to be disposed of by codicil" does not pass the reserved property if no disposition is made of it. *Davers v. Deves*, 3 P. W. 40.

"Small  
remainder."

So, too, though a "small" balance would include any balance that may happen to remain after making the payments directed by the testator, a bequest of the "small remainder" will not include interests that lapse. *Page v.*

*Young*, 19 Eq. 501; *A.-G. v. Johnstone*, Amb. 576; see **Chap. XIX.**  
*Bland v. Lamb*, 2 J. & W. 399.

Where a testator gives his trustees an option to sell his real and personal estate, and then gives the residue of the proceeds of sale, and the option is not exercised, an intention may be inferred to give the property whether sold or not. *Waddington v. Yates*, 15 L. J. Ch. 223.

Residue  
of proceeds  
of sale where  
no sale.

Where property is excepted from a residue, and the only object of the exception is to make a particular bequest, which fails, the excepted property falls into the residue. *Evans v. Jones*, 2 Coll. 516; *Wingfield v. Newton*, cit. 2 Coll. 520; *Thompson v. Whitelock*, 7 W. R. 625; 4 De G. & J. 490; see *Tatham v. Vernon*, 29 B. 604; *Torrens v. Millington*, 26 W. R. 753; *Blight v. Hartnoll*, 23 Ch. D. 218.

Property  
excepted from  
residue.

Similarly, if the exception can be read as intended only to exclude the property from a trust for sale to which the residue is subject, the property excepted passes to the residuary legatees. *James v. Irving*, 10 B. 276; *Dobson v. Banks*, 32 B. 259.

On the other hand, if the residue is given charged with debts, and certain property is exonerated from the charge and excepted from the residue, it will not pass with the residue on failure of the particular bequest. *Wainman v. Field*, Kay, 507.

Where the residue itself is distributed in certain shares, and a legacy is given out of one of the shares followed by a disposition of the residue of such share, the legacy is undisposed of, if the legatee predeceases the testator. *Skrymsher v. Northcote*, 1 Sw. 566; *Lloyd v. Lloyd*, 4 B. 231.

Residue of  
residue.

So, where the residue is given as to one-fourth on trusts which fail, a gift of the residue of that residue will not carry the lapsed fourth. *Simmons v. Rudall*, 1 Sim. N. S. 115.

A bequest of residue beyond a sum of 10,000*l.*, directed to be set apart out of the residue, will not carry lapsed portions of the 10,000*l.* *Green v. Pertwee*, 5 Ha. 249.

Where the residue is given between several persons nominatim as tenants in common, and the gift to one of them is revoked, the gift of that share lapses, whether the revocation be of the share or of the trusts of the will, so far as they relate to the share. *Cresswell v. Cheslyn*, 2 Ed. 123; *Ramsay v.*

Revocation of  
share of  
residue.

Chap. XIX. *Shelmerdine*, L. R. 1 Eq. 129; *Sykes v. Sykes*, 4 Eq. 200; 3 Ch. 301.

If a share is expressed to be revoked with a view to put the other residuary legatees on an equality with the one whose share is revoked, the revoked share passes to the others. *Vaudrey v. Howard*, 2 W. R. 32.

Where the residue is completely disposed of, and by a subsequent clause, the testator directs that another person is to take a share, the effect of a revocation of the latter gift is to leave the earlier gift of the whole residue effectual. *Harris v. Davis*, 1 Coll. 416.

For the construction of a will where a residue was given to legatees in proportion to their legacies, and the testator by a codicil revoked some of the legacies, and gave other legacies in substitution for them, see *In re Courtauld's Estate*; *Courtauld v. Cawston*, W. N. 1882, 185; and see, too, *Hall v. Severne*, 9 Sim. 515.

Direction that  
share of  
residue shall  
fall into  
residue.

Where a testator revokes or alters a gift of a share of residue, and directs that the share, or the share subject to the alteration, shall fall into residue, there is no lapse, but the share is divisible amongst the other residuary legatees. *In re Palmer*; *Palmer v. Answorth*, (1893) 3 Ch. 369, overruling *Humble v. Shore*, 7 Ha. 247; 1 H. & M. 550. The cases in which *Humble v. Shore* was followed, *Lightfoot v. Burstall*, 1 H. & M. 546; *In re Barker's Estate*; *Hetherington v. Longridge*, 15 Ch. D. 635; *Re Beris's Trusts*, 20 W. R. 359; and *In re Savage's Trusts*, 50 L. J. Ch. 131, must also be taken as overruled, as the principle of *In re Palmer* must extend to all directions that a share of residue which the will does not fully dispose of shall fall into residue. See also *Crawshaw v. Crawshaw*, 14 Ch. D. 817; 29 W. R. 68; *In re Rhoades*; *Lane v. Rhoades*, 29 Ch. D. 142; *In re Ballance*, 42 Ch. D. 62; *Re Owen*, 36 Sol. J. 539; *Holgate v. Jennings*, 37 Sol. J. 303.

Where one of the residuary legatees dies, and the testator, by codicil, confirms the will, except as to any legacy lapsed, it has been held that the share of the deceased legatee is undisposed of. *Re Mary Wood's Will*, 29 B. 236.



## III. EXECUTION OF GENERAL POWERS BY RESIDUARY GIFTS.

A. *General Powers before the Wills Act.*

In wills before the Wills Act a general devise did not, as a rule, carry lands over which the testator had a general power of appointment. *Hoste v. Blackman*, 6 Mad. 190; *Roake v. Denn*, 4 Bl. N. S. 1.

Effect of a general devise on powers before the Wills Act.

But the lands subject to the power passed:—

If there was a clear disposition of lands, and the testator had at the time no other lands. *Standen v. Standen*, 2 Ves. Jun. 589; 6 B. P. C. 193; *Denn v. Roake*, 6 Bing. 475; 5 B. & C. 732; see *In re Mills*; *Mills v. Mills*, 34 Ch. D. 186.

As regards realty.

It was necessary that there should be a clear disposition of lands, and not merely such general words as estate or property, though they would be sufficient to pass the proper lands of the testator. *Jones v. Curry*, 1 Sw. 66; *Evans v. Evans*, 23 B. 1.

The land subject to the power was allowed to pass only in order to give effect to the words of the will, and not because the testator had shown an intention to execute the power, and therefore only so much of the land subject to the power was allowed to pass as was sufficient to give effect to the words of the will. Thus, if a testator had freeholds and a power of appointment over freeholds and copyholds, a devise of his freeholds and copyholds passed only the copyholds and not the freeholds subject to the power. *Lewis v. Llewellyn*, T. & R. 104; *Napier v. Napier*, 1 Sim. 28.

But a gift of real and personal estate where the testator had no real estate, but had a power of appointing real and personal estate, passed both the real and personal estate subject to the power. *Standen v. Standen*, 2 Ves. Jun. 589; 6 B. P. C. 193.

These rules were not applicable to personalty, since, though the testator might not at the time of the bequest have possessed any property but that subject to the power which could have passed under the bequest, it would have been effectual with regard to after-acquired property.

As regards personalty.

Therefore, if there was at the testator's death any property upon which the words of general gift could take effect, the

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If at his death the testator has no property but that subject to the power.

Power vested in married woman.

power was not executed. *Jones v. Curry*, 1 Sw. 66; *Langham v. Nenny*, 3 Ves. 467; *Croft v. Slec*, 4 Ves. 60; *Bradley v. Westcott*, 13 Ves. 445; *Buckland v. Barton*, 2 H. Bl. 186; *Jones v. Tucker*, 2 Mer. 533.

It has also been said that even if there was at the testator's death no other property upon which the general words could operate, the power would nevertheless not be executed. In all the cases, however, cited in support of this proposition, there was some property besides that subject to the power. See *supra*. In *Jones v. Tucker*, *supra*, which goes nearest to the point, there were apparently arrears of rent due to the testatrix at the time of her death; and see *Humphery v. Humphery*, 36 L. T. 90.

On the other hand, a power vested in a married woman has been held to be executed by a general gift in her will when there was nothing else at her death upon which the gift could operate (see *post*), and there seems to be no apparent reason why married women should in this respect differ from other persons.

With regard to realty, it is clear that where a married woman had a power to appoint realty, a general devise of her real and personal property passed the estate subject to the power, there being nothing else upon which the devise could operate. *Curteis v. Kenrick*, 3 M. & W. 461; 9 Sim. 443; *Churchill v. Dibbin*, 9 Sim. 447, n.

Where the property subject to the power was personalty, the cases go to this:—

1. Where a married woman had a power of appointment, and no other property at the date of the will, but at her death there was some separate estate upon which the will could operate, a general gift did not execute the power. *Lorell v. Knight*, 2 Sim. 275, affirmed on appeal. *Lemprière v. Valpy*, 5 Sim. 108; *Evans v. Evans*, 23 B. 1.

2. But if at her death there was nothing upon which the will could take effect, the power was executed. *Shelford v. Acland*, 23 B. 10, where, however, the will was since the Wills Act. *A.-G. v. Wilkinson*, L. R. 2 Eq. 816; see *In re Herdman's Trust*. 31 L. R. Ir. 87.

B. *General Powers after the Wills Act.*

Sect. 27 of the Wills Act enacts that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be) which he may have power to appoint, in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will. And in like manner a bequest of the personal estate of the testator or any bequest of personal property described in a general manner shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will.

Effect of s. 27 of the Wills Act on general powers.

The effect of the section is to put property over which the testator has a general power of appointment in the same position as his own property.

A power to appoint by will only is a general power within the section. *Re Powell's Trust*, 18 W. R. 228; 39 L. J. Ch. 188.

Testamentary power.

A power to appoint generally, with the exception of specified persons, is not a general power within the section. *In re Byron's Settlement*; *Williams v. Mitchell*, (1891) 3 Ch. 474.

Such a power might be within the section if the excepted persons were dead when the power was exercised. *In re Byron's Settlement*, *supra*.

A power to appoint by will expressly referring to the power is not a general power within the section. *In re Phillips*; *Robinson v. Burke*, 41 Ch. D. 417; *In re Tarrant's Trust*, 58 L. J. Ch. 780; *Phillips v. Cayley*, 43 Ch. D. 222 (overruling *In re Marsh*; *Mason v. Thorne*, 38 Ch. D. 630); *In re Davies*; *Davies v. Davies*, (1892) 3 Ch. 63.

Power to appoint by will referring to power.

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Power to  
charge and  
appoint.

A power to charge land with a sum of money and to appoint the money when charged is not a power within the section. *In re Wallinger*, (1898) 1 Ir. 139.

But where the testator gives his real and personal estate on trust for sale, and then gives a beneficiary power to appoint that a given sum may be raised and paid to such persons as the donee of the power thinks fit, this is in effect a power to appoint the sum, and is within the section. *In re Jones ; Greene v. Gordon*, 84 Ch. D. 65.

The fact that the power is contained in a settlement made by the testator before the date of his will raises no presumption that the will was not intended to execute the power. *In re Clark's Estate ; Maddick v. Marks*, 14 Ch. D. 422.

Contrary  
intention.

A contrary intention is not indicated by an express confirmation of the trusts of the instrument creating the power, where there is anything to which such confirmation can apply ; as, for instance, other settled property or prior trusts of the property over which the testator has the power, though the property may be disposed of in default of appointment. *Lake v. Currie*, 2 D. M. & G. 536 ; *Hutchin v. Osbourne*, 4 K. & J. 252 ; 3 De G. & J. 142.

Nor by the fact that a life interest is given to a person when, if that person survives the testator, the power will be gone. *Thomas v. Jones*, 2 J. & H. 475 ; 1 D. J. & S. 68.

But it has been held that a gift of property "not otherwise disposed of" does not execute a power where the property subject to the power is disposed of in default of appointment. *Moss v. Harter*, 3 Sm. & G. 458, *sed qu.* ; see *Bush v. Concan*, 9 Jur. N. S. 429 ; 11 W. R. 395.

The section applies as well to a general residuary bequest as to a gift of a general pecuniary legacy. *Spooner's Trust*, 2 Sim. N. S. 129 ; *Clifford v. Clifford*, 9 Ha. 675 ; *A.-G. v. Brackenbury*, 1 H. & C. 782 ; *Hawthorn v. Shedden*, 3 Sm. & G. 293 ; *Shelford v. Acland*, 23 B. 10 ; *Re Wilkinson*, 4 Ch. 587.

Effect upon a  
general power  
of a direction  
to pay debts.

A direction to executors to pay the testator's debts out of his personal estate operates as an execution of a general power in favour of the executor. *Wilday v. Barnett*, 6 Eq. 193.

A simple direction to pay debts without the appointment

of an executor would have the same effect. *Laing v. Cowan*, Chap. XIX.  
24 B. 112.

But the mere appointment of an executor would probably not be enough. Per Wickens, V.-C., *In re Davies' Trusts*, 18 Eq. 166.

By the combined effects of sects. 24 and 27, a general power may be exercised by a general gift in a will made prior to the instrument creating the power, and it is now settled that a general devise or bequest executes a general power contained in a settlement subsequently made by the testator, though the will thereby makes the whole settlement nugatory. *Boyes v. Cook*, 14 Ch. D. 53; *Airey v. Bower*, 12 App. C. 263, overruling *In re Ruding's Settlement*, 14 Eq. 266; see, too, *In re Hernando*; *Hernando v. Sawtell*, 27 Ch. D. 284.

Power exercised by will made previous to instrument creating power.

A subsequent power created by the testator will of course *à fortiori* be executed where the previous will expressly gives all property over which the testator has any power. *Patch v. Shore*, 2 Dr. & Sm. 589; *Re Old's Trusts*; *Pengelly v. Herbert*, 54 L. T. 677.

Or where the will expressly refers to the property, which is afterwards settled by the testator, who reserves to himself a power. *Stillman v. Weedon*, 16 Sim. 26; *Meredyth v. Meredyth*, I. R. 5 Eq. 565; *Cofield v. Pollard*, 3 Jur. N. S. 1203; see p. 222, *post*.

The same is the case where the power, though existing at the date of the will, is then only contingent, being given to the survivor of two persons of whom the testator is one. *Thomas v. Jones*, 2 J. & H. 475; 1 D. J. & S. 63. See p. 79, *ante*.

Contingent power.

Where the settlor and testator were the same person and the power was to be executed by a last will, and the testator made a will before and another after the creation of the power, the latter purporting to be his last will, it was held that the first will was not meant to be an execution of the power. *Pettinger v. Ambler*, L. R. 1 Eq. 510.

Where the facts were first settlement, with power to appoint by deed or will, will purporting to execute only the power in this settlement, second settlement under the power in the first,

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and creating a power to appoint by will, the will was held not to execute the power in the second settlement. *Thompson v. Simpson*, 50 L. J. Ch. 461; see, however, *Airey v. Bower*, 12 App. C. 263.

Power created by third person.

It does not appear to have been decided that a mere general gift will execute a power subsequently given to the testator by third persons, though there can be no doubt that it would.

But a general gift will not execute a power given to the testator by the will of a person who survives him. *Jones v. Southall*, 32 B. 91.

Whether an appointment takes the fund from the donees in default of appointment in all events.

An appointment to executors of a fund, over which the testator has a general power, takes the fund away from the donees in default of appointment, though some of the trusts declared by the testator may fail or trusts only exhausting part of the fund are declared. *Chamberlain v. Hutchinson*, 22 B. 444; *Keown's Estate*, I. R. 1 Eq. 372; *Brickenden v. Williams*, 7 Eq. 310; *Wilkinson v. Schneider*, 9 Eq. 423; *Scriven v. Sandom*, 2 J. & H. 743; *In re Pinède's Settlement*, 12 Ch. D. 667; *In re Ickeringill's Estate*; *Hinsley v. Ickeringill*, 17 Ch. D. 151; *Blight v. Hartnoll*, 23 Ch. D. 218; see *Re Horton*; *Horton v. Perks*, 51 L. T. 420.

Real estate subject to a power.

The rule applicable to personalty applies also to real estate, subject to a power, so that an appointment to trustees upon trust for a person, who predeceases the testator, takes the estate from the persons entitled in default of appointment. *In re Van Hagen*; *Sperling v. Rochfort*, 16 Ch. D. 18; *Willoughby Osborne v. Holyoake*, 22 Ch. D. 238.

Power exercised by deed.

The same doctrine has been applied where a general power was exercised by a marriage settlement. The settlor was held to have made the property subject to the power her own, so that upon failure of the ultimate trusts of the settlement there was a resulting trust for the settlor. *In re Scott*; *Scott v. Hanbury*, (1891) 1 Ch. 298.

The question whether the appointed fund is taken away from the persons entitled in default of appointment for all purposes, so that if the dispositions of the will fail the property goes to the heir-at-law or next of kin of the testator, is, however, one of intention, and if an intention can be gathered from the will

to dispose of the fund for particular purposes only, the fund goes as in default of appointment if those purposes fail. Chap. XIX.

Thus a mere direction to pay debts takes the fund from the persons entitled in default of appointment only so far as it is required to pay the debts. *Laing v. Cowan*, 24 B. 112.

And where a testatrix by her will only exercised the power by appointing the property to her husband for life and then to her niece, and appointed an executor, but made no other disposition of her property, it was held that on the death of the niece before the testatrix the property went as in default of appointment. *In re Thurston*; *Thurston v. Evans*, 32 Ch. D. 508.

A distinction has been drawn between an appointment of the fund to a legatee direct and an appointment to trustees for the legatee. In the former case it has been held that the fund goes as in default of appointment if the legatee dies before the testator. *In re Davies' Trusts*, 13 Eq. 163; *In re De Lusi's Trusts*, 3 L. R. Ir. 232; *In re Boyd*; *Kelly v. Boyd*, (1897) 2 Ch. 232; see *Coxen v. Rowland*, (1894) 1 Ch. 406.

The fact that the testator distinguishes between the property subject to the power and his other property, and deals with each separately, has also been considered important as showing an intention not to make the appointed property part of the testator's assets for all purposes. *Eusum v. Appleford*, 5 M. & Cr. 56; *In re De Lusi's Trust*, 3 L. R. Ir. 232. See *Biddulph v. Williams*, 1 Ch. D. 203; *Coxen v. Rowland*, (1894) 1 Ch. 406.

Probably the distinctions which have been taken in some of the cases would not now be followed. See, too, *Bristow v. Skirrow*, 10 Eq. 1, which turned on the language of the power; *Hoare v. Osborne*, 12 W. R. 661; 33 L. J. Ch. 586; 10 Jur. N. S. 694, a case which has not been approved. See *In re Pinèdi's Settlement Trusts*, 48 L. J. Ch. 741, 743, per Jessel, M.R.; *Willoughby Osborne v. Holyoake*, 22 Ch. D. 211, per Fry, J.; *In re De Lusi's Trusts*, 3 L. R. Ir. 232, p. 240.

Where a general power of appointment over a fund is executed by will, the executors of the will are the proper persons to administer and give a discharge for the fund. *In re Philbrick's* Administra-  
tion of  
appointed  
fund.

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*Trusts*, 13 W. R. 570; 34 L. J. Ch. 368; *Hayes v. Oatley*, 14 Eq. 1; *In re Hoskin's Trusts*, 5 Ch. D. 229; 6 *ib.* 281.

It is however doubtful whether this rule applies in the case of a will of a married woman under a power, in cases not within the Married Women's Property Act, 1882. See Davidson, *Precedents*, vol. 4, p. 585.

Power of  
revocation  
and new  
appointment.

A general devise or bequest will not, under sect. 27, execute a power of revocation and new appointment. *Pomfret v. Perring*, 18 B. 618; 5 D. M. & G. 775; *Palmer v. Newell*, 20 B. 82; *Charles v. Burke*, 43 Ch. D. 223, n.; *In re Brace*; *Welch v. Colt*, (1891) 2 Ch. 671; *In re Goulding*; *Dobell v. Dutton*, 48 W. R. 183; see *In re Wells*; *Hardisty v. Wells*, 42 Ch. D. 646.

However, a general bequest by will has been held to exercise a general power, which had been previously exercised by a testamentary appointment not referred to in the will, and thereby to revoke the testamentary appointment. *In re Gibbes' Settlement*; *White v. Randolph*, 37 Ch. D. 143.

## IV. QUESTIONS BETWEEN REAL AND PERSONAL RESIDUE.

Effect of  
sale of land  
subject to  
general power.

Difficulties sometimes arise as to the effect of residuary gifts when a testator has a general testamentary power of disposition over settled land which is sold under powers in the settlement.

A general devise of lands, or of lands over which the testator has power to dispose, will not exercise a power of appointment over the proceeds of sale of lands settled on trust for sale. *Adams v. Austen*, 3 Russ. 461.

On the other hand, a general devise of lands would pass the proceeds of sale of land which under a settlement are subject to reinvestment in land. *In re Duke of Cleveland's Settled Estates*, (1893) 3 Ch. 244.

Where a testatrix had a general power of disposition by will over land, which was subject to a power of sale and reinvestment in land with her consent, and the land was sold and the proceeds paid to her, it was held that a general residuary bequest passed the proceeds of sale. *Chandler v. Pocock*, 15 Ch. D. 491; 16 Ch. D. 648; see *In re Harman*; *Lloyd v. Tardy*, (1894) 3 Ch. 607.



And where a testator has a general testamentary power over a settled estate, portions of which are sold with his consent under the usual powers, and there is no third person who can claim to have the proceeds invested in land, the proceeds of portions of the settled estate sold with the testator's consent pass under a general residuary bequest, and not under a residuary devise. *Gale v. Gale*, 21 B. 349; *Blake v. Blake*, 15 Ch. D. 481.

On the other hand, if there is a third person having an intermediate interest, who has an equity to have the proceeds of sale laid out in land, a general residuary gift will not pass the proceeds of sale. *Gillies v. Longlands*, 4 De G. & S. 379; *In re Greaves' Settlement*, 23 Ch. D. 313.

Where a testator has power to devise lands and also to appoint a sum charged upon the land, a general devise will not operate as an appointment of the sum so charged, which will pass under a general residuary bequest. *Farmer v. Bradford*, 3 Russ. 354; *Clifford v. Clifford*, 9 Ha. 675.

The rents of land which is devised contingently fall, until the contingency happens, into the real residue. *In re Freme*; *Freme v. Logan*, 65 L. T. 183; 60 L. J. Ch. 562.

## CHAPTER XX.

## EXECUTION OF SPECIAL POWERS.

**Chap. XX.**

Special powers not within s. 27 of Wills Act.

Not within s. 25.

Not within s. 24.

SPECIAL powers are not within sect. 27 of the Wills Act. *Cloves v. Airdry*, 12 B. 604; *Russell v. Russell*, 12 Ir. Ch. 377; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Humphery v. Humphery*, 36 L. T. 90; *Holyland v. Lewin*, 26 Ch. D. 266.

Nor are they within sect. 25, so that where a testamentary appointment under a special power fails, a residuary gift will not by virtue of that section pass the property, the appointment whereof has failed. *Holyland v. Lewin*, 26 Ch. D. 266; overruling *Freme v. Clement*, 18 Ch. D. 499.

And a will disposing of specific property which the testator afterwards settles, reserving to himself a special power of appointment, does not, by virtue of sect. 24 of the Wills Act, execute the special power. *In re Wells*; *Hardisty v. Wells*, 42 Ch. D. 646; *Doyle v. Coyle*, (1895) 1 Ir. 205, not following *Stillman v. Weedon*, 16 Sim. 26.

Since the Wills Act the fact that a person who purports to devise real estate has no real estate, but has a special power to appoint real estate, is not alone sufficient to show an intention to execute the power.

It is a question of construction upon the whole will, whether the special power was intended to be executed. *In re Mills*; *Mills v. Mills*, 34 Ch. D. 186; *In re Esther Williams*; *Foulkes v. Williams*, 42 Ch. D. 93; *Peirce v. McNeale*, (1894) 1 Ir. 118.

Intention not to appoint on a mistaken view of the rights.

If the testator states that he does not execute a power because the property will go in a particular way, when in fact he is mistaken, this cannot be treated as an execution of

the power so as to make the property pass in accordance with his view. *Langston v. Langston*, 21 B. 552; *In re Jack*; *Jack v. Jack*, (1899) 1 Ch. 374. Chap. XX.

In order to exercise a special power there must be a reference to the power or to the property subject to the power, or an intention otherwise expressed in the will to exercise the power. *Wildbore v. Gregory*, 12 Eq. 482; *Harvey v. Harvey*, 23 W. R. 478; *In re Herdman's Trusts*, 81 L. R. Ir. 87; *In re Huddleston*; *Bruno v. Eyston*, (1894) 3 Ch. 595. How special power executed.

1. What is a sufficient reference to a power.

A ratification of the trusts of the settlement creating a power is no evidence of an intention to execute the power. *Re Bringloe's Trust*, 26 L. T. 58. What is a sufficient reference to a power.

A recital that a person is entitled to certain funds or to an estate, over which the testator has a power of appointment, will not amount to an execution of the power in favour of that person. *Minchin v. Minchin*, I. R. 5 Eq. 178, 258; *Pennefather v. Pennefather*, I. R. 7 Eq. 300; *L'Estrange v. L'Estrange*, 25 L. R. Ir. 399; *Harerty v. Curtis*, (1895) 1 Ir. 23; see *Lees v. Lees*, I. R. 5 Eq. 549; *In re Walsh's Trusts*, 1 L. R. Ir. 320.

A reference to a power as contained in a settlement of 1819, when the power was, in fact, contained in a resettlement of 1839, has been held a sufficient reference. *Re Wilmot*, 9 B. 644.

Words referring to a "beneficial power" do not *primâ facie* mean a special power, though they may do so upon the language of a particular will. *Ames v. Cadogan*, 12 Ch. D. 868; *Von Brockdorff v. Malcolm*, 30 Ch. D. 172. Beneficial power.

Where a testator gives his own property and any property over which he has any disposing power, and he has only a special power of appointment, the latter words may be sufficient to include a special power. The intention must be gathered from the whole will. The cases do not lay down any general principles, and are not easily reconcilable. Effect of gift of property over which testator has disposing power.

The simplest case is where the appointment is made to objects of the power, and is not in excess of the power. In such a case the power will be exercised. *Gainsford v. Dunn*, 17 Eq. 405; *In re Swinburne*; *Swinburne v. Pitt*, 27 Ch. D. 696. Gift not in excess of power.

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Gift in excess  
of power.

The fact that the will, if treated as an execution of the power, gives a greater interest than the power authorises, for instance, an absolute interest instead of a life interest, is not necessarily conclusive against an exercise of the power. *In re Teape's Trusts*, 16 Eq. 442.

Gift to  
persons not  
objects.

Nor is the fact that a part of the property is given for purposes not authorised by the power or to persons who are not objects of the power. *Bailey v. Lloyd*, 5 Russ. 380; *Pidgely v. Pidgely*, 1 Coll. 255; *In re Swinburne*; *Swinburne v. Pitt*, 27 Ch. D. 696; *Re Boyd*; *Nield v. Boyd*, 69 L. T. 92.

Trust to  
pay debts.

Nor the fact that the property is given as a residue or even that it is given upon trust to pay the testator's debts, as effect may be given to this trust by limiting it to the testator's own property. *Cowx v. Foster*, 1 J. & H. 30; *Ferries v. Jay*, 10 Eq. 550; *In re Teape's Trusts*, 16 Eq. 442; *In re Swinburne*; *Swinburne v. Pitt*, 27 Ch. D. 676; *In re Milner*; *Bray v. Milner*, (1899) 1 Ch. 563; see *In re Cotton*; *Wood v. Cotton*, 40 Ch. D. 41; *Clogstoun v. Walcott*, 13 Sim. 523, is not to be followed; see *In re Teape's Trusts*, *supra*.

But each of these circumstances affords an argument that the will was not intended to execute the power, and a combination of them may be sufficient to prevent the power from being exercised. See *Hope v. Hope*, 5 Giff. 13; *In re Cotton*; *Wood v. Cotton*, 40 Ch. D. 41.

A gift of "all my property whereof I have power to dispose" may also execute a special power if the circumstances or the language of the will are sufficient to indicate an intention to exercise the power. *Cooke v. Cunliffe*, 17 Q. B. 245; *Cowx v. Foster*, 1 J. & H. 30; *Thornton v. Thornton*, 20 Eq. 599; *In re Sharland*; *Rew v. Wippell*, (1899) 2 Ch. 536; see *In re Richardson's Trusts*, 17 L. R. Ir. 436.

2. What is a sufficient reference to the property subject to the power.

There must  
be a refer-  
ence to a  
specific fund.

There must be no doubt on the face of the will that the testator is referring to some specific fund in existence at the time of making the will.

Therefore, the fact that property of the same kind as that subject to the power is given merely in general terms—as, for

instance, some particular kind of stock—will not execute the power, since the gift would be satisfied by purchasing the stock in question. *Webb v. Honnor*, 1 J. & W. 352; *Mattingley's Trusts*, 2 J. & H. 427; *In re Wait*; *Workman v. Petgrave*, 30 Ch. D. 617.

Nor will the fact that legacies are given equal in amount to the fund subject to the power. *Jones v. Tucker*, 2 Mer. 588; *Davies v. Thorns*, 3 De G. & S. 347; *Forbes v. Ball*, 3 Mer. 437; explained in *Davies v. Thorns*.

Nor that legacies are given largely in excess of the testator's estate, unless the property subject to the power is included in it. *Lowe v. Pennington*, 10 L. J. Ch. 83.

On the other hand, where the testator uses words showing that he is disposing of a specific fund, the power will be executed. *Lowndes v. Lowndes*, 1 Y. & J. 445; *Innes v. Sayer*, 7 Ha. 381; 3 Mac. & G. 607; *Rooke v. Rooke*, 2 Dr. & S. 38; *David's Trusts*, Johns. 495; *Gratwick's Trusts*, L. R. 1 Eq. 177; *Fletcher v. Fletcher*, 7 L. R. Ir. 40.

And this is the case though some of the persons in whose favour the power is exercised are incapable of taking. *Gratwick's Trusts*, *supra*; *Bruce v. Bruce*, 11 Eq. 371.

Where a specific fund is referred to, the fact that the fund subject to the power is misdescribed, or that the donee purports to appoint under a different power, makes no difference. *Mackinley v. Sison*, 8 Sim. 561; *Bruce v. Bruce*, 11 Eq. 371.

In the same way, where a portion of the property subject to the power is excepted out of a general gift, the rest of the property subject to the power passes. *Walter v. Mackie*, 4 Russ. 76; *Reid v. Reid*, 25 B. 469.

3. There is a third class of cases where a power is partially exercised either by a gift of some of the property subject to the power or by an express reference to the power, and there is then a general residuary gift. The question then arises whether the residuary gift executes the power so far as it remains unexecuted.

Whether  
residuary gift  
executes a  
power already  
partially  
exercised.

A mere residuary gift without more would not have this effect. *Hughes v. Turner*, 3 M. & K. 666; *Butler v. Gray*, 5 Ch. 26.

But if appointed parts of the fund are charged on the residue,  
T.W. Q

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or there is an intention expressed to appoint the whole fund, or there is evidence on the face of the will that the testator treats the fund subject to the power as his own, a residuary gift may execute the power so far as it remains unexecuted. *Elliott v. Elliott*, 15 Sim. 321; *Davies v. Fisher*, 5 B. 201; *Re Comber's Settlement*, 14 W. R. 172; *Harvey v. Stracey*, 1 Dr. 73.

And a gift of "the residue of my property and over which I have any power of disposal by will" may pass a share of a fund appointed by the will under a special power to a person not an object of the power. *In re Hunt's Trusts*, 31 Ch. D. 308.

Republication  
of will.

Where there was a special power exercisable by the survivor of a husband and wife, after the death of the other of them, and the husband made a will in the lifetime of the wife containing words sufficient to refer to the special power, and after her death republished the will by a codicil, the will was held to execute the power. *In re Blackburn*; *Smiles v. Blackburn*, 43 Ch. D. 75; see *Hope v. Hope*, 5 Giff. 13.

Execution of  
power of  
revocation.

Where property is appointed under a power and a power of revocation is reserved, the power of revocation may be impliedly exercised if the will is expressed to be in exercise of the original power or appoints the property subject to the power. See *Quinn v. Armstrong*, 1. R. 11 Eq. 161.

But where a special power in a settlement has been partially exercised by a deed reserving a power of revocation, an appointment by will expressed to be made by virtue of the power in the settlement or otherwise howsoever, will not exercise the power of revocation, but will take effect only on the unappointed property. *Pomfret v. Perring*, 5 D. M. & G. 775.

And a will expressly exercising a special power, which is afterwards exercised by a deed reserving a power of revocation, will not operate upon so much of the property as is well appointed by the deed. *In re Wells' Trusts*; *Hardisty v. Wells*, 42 Ch. D. 646.

An appointment expressed to be under a particular power and all other powers enabling the testator, may take effect upon such interest as the testator has if the particular power does not in the events that have happened become exercisable. *Sing v. Leslie*, 2 H. & M. 68.

It is well settled that a power to appoint land is well exercised by an appointment to trustees on trust for sale; and also that a power to appoint a fund is well exercised by an appointment of the fund to trustees for certain persons, provided in each case the persons beneficially interested under the appointment are objects of the power. *Long v. Long*, 5 Ves. 445; *Kenworthy v. Bate*, 8 Ves. 798; *Crozier v. Crozier*, 3 D. & War. 371; *Thornton v. Bright*, 2 M. & Cr. 230.

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Appointment under special power of land to trustees on trust for sale;

In the case of an appointment of land to trustees on trust for sale, where the trustees take the legal estate, they are the persons to sell and make a title. *In re Paget*; *Mellor v. Mellor*, (1896) 1 Ch. 290.

But in the case of a fund vested in trustees and appointed under a special power to new trustees upon trusts, the original trustees are the persons to administer the trusts. *Busk v. Aldam*, 19 Eq. 16; *Von Brockdorff v. Malcolm*, 30 Ch. D. 172; see *Scotney v. Lomer*, 29 Ch. D. 535; 31 Ch. D. 380; *In re Cotton*; *Wood v. Cotton*, 40 Ch. D. 41; *In re Tyssen*; *Knight-Bruce v. Butterworth*, (1894) 1 Ch. 56.

of personalty to new trustees.

## CHAPTER XXI.

## CONVERSION.

## I. WHAT AMOUNTS TO A DIRECTION TO CONVERT.

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Imperative  
direction  
to convert.

Direction that  
land is to be  
considered  
money or  
money land.

If there is an imperative direction to convert, the property is in equity treated as converted from the testator's death.

A direction that land is to be considered as money or *vice versa* will not work a conversion, but an actual change of one form of property into another must be intended. *Johnson v. Arnold*, 1 Ves. Sen. 171; *A.-G. v. Mangles*, 5 M. & W. 120; *Edwards v. Tuck*, 28 B. 268; 3 D. M. & G. 40.

A trust for sale which is void for remoteness does not effect a conversion. *Goodier v. Edmunds*, (1893) 3 Ch. 455.

Upon the construction of the whole will what is in form only a power to convert may be shown to be in effect an imperative trust, and on the other hand, what is in form a trust for sale may be shown to be a discretionary power only. *Burrell v. Baskerfield*, 11 B. 525; *In re Hotchkys*; *Freke v. Calmady*, 32 Ch. D. 408; *Glover v. Heelis*, 32 L. T. 534; 23 W. R. 677.

Direction to  
divide.

A direction to divide does not imply a conversion. *Cornick v. Pearce*, 7 Ha. 477; *Lucas v. Brandreth*, 28 B. 273.

But a direction to get together and divide among a large number of legatees property consisting of realty and personalty and previously described as scattered about and not realised, coupled with a direction to invest some of the shares, is in effect a direction to convert. *Mower v. Orr*, 7 Ha. 475; see *Owen v. Owen*, (1897) 1 Ir. 588.

Discretion as  
to time.

Where a conversion is directed, the fact that the trustees have a discretion as to time will not alter the general rule.



*Doughty v. Bull*, 2 P. W. 320; *In re Raw*; *Morris v. Griffiths*, Chap. XXI.  
26 Ch. D. 60.

When conversion is to take place upon request the question is, whether the conversion was intended to be made in all events, and the request is only an additional safeguard, or whether no conversion was intended till request. Conversion upon request.

If the conversion is to be upon request of certain persons, and the property is disposed of, whether converted or not, there is no conversion till the request. *In re Taylor's Settlement*, 9 Ha. 596; *Daries v. Goodhew*, 6 Sim. 585; see *Mcc. Gwire v. Mcc. Gwire*, (1900) Ir. 200.

On the other hand, if there is a general intention to convert evidenced by the fact that the limitations are applicable only to the property as converted, and by the fact that the conversion is to be at the request of certain persons or the survivor or the executors or administrators of the survivor, the property will be considered as converted. *Thornton v. Hawley*, 10 Ves. 129; see *Lechmere v. Earl of Carlisle*, 3 P. W. 211; *Batteste v. Maunsell*, 1. R. 10 Eq. 314.

Where trustees have a power to convert or an absolute discretion to convert or not, the property remains unconverted till the power or discretion is exercised. *Greenway v. Greenway*, 2 D. F. & J. 128; *Polley v. Seymour*, 2 Y. & C. Ex. 708; *Yates v. Yates*, 6 Jur. N. S. 1023; *Brown v. Bigg*, 7 Ves. 279; *Bourne v. Bourne*, 2 Ha. 35. Power or discretion to convert.

Similarly, where trustees have an option to convert either into realty or personalty, the property will be considered of that species into which the trustees converted it. *Van v. Barnett*, 19 Ves. 102; *Walker v. Denne*, 2 Ves. Jun. 170; *Rich v. Whitfield*, L. R. 2 Eq. 583.

Where there is a settlement of real estate with the usual power of sale, and trust for reinvestment in freeholds or leaseholds with power of interim investment in personalty, a sale and investment of the proceeds in personalty will not effect a conversion. *In re Bird*; *Pitman v. Pitman*, (1892) 1 Ch. 279.

The option of the trustees may, however, be controlled by the general intention expressed in the will. Thus, if personalty is directed to be laid out in land or other security, and settled Discretion may be controlled by the context.

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in the same way as realty devised by the will, the general intention that the real and personal estate are to go together may override the option. *Earlom v. Saunders*, Amb. 241; *Cowley v. Harstonge*, 1 Dow, 361; see *Minors v. Battison*, 1 App. C. 428.

And an option to lay out a sum in the purchase of lands may amount to a positive direction if there is a provision that if the purchase is not made the securities are to be and enure to such purposes as if land had been purchased. *Jobson v. Arnold*, 1 Ves. Sen. 169.

But where the will disposes only of personalty, and the trust for conversion does not apply to securities for money, and there is then a trust to invest the proceeds of conversion in the purchase of real estate or in the public funds, the fact that the limitations are appropriate only to realty will not control the trustees' option so as to convert the personalty. *Erans v. Ball*, 30 W. R. 899; 47 L. T. 165.

The fact that personalty which trustees have an option to convert is given to a person, his heirs and assigns, is not alone sufficient to limit the option of the trustees. *Cookson v. Cookson*, 12 Cl. & F. 121; *Atwell v. Atwell*, 13 Eq. 23.

## II. WHETHER CONVERSION IS DIRECTED FOR ALL THE PURPOSES OF THE WILL.

It is a question of construction in each case whether conversion is directed for all or only for some of the purposes of the will; whether, for instance, personalty to be laid out in land goes to the residuary devisee, or land directed to be sold goes to the residuary legatee if the immediate purpose for which conversion is directed fails.

Money to be  
laid out in  
land.

1. If personalty is directed to be laid out in the purchase of land to be subject to the uses of the testator's real estate, and those uses fail, the conversion fails also, and the personalty goes to the residuary legatee. *Hereford v. Ravenhill*, 5 B. 51.

Proceeds of  
sale of realty  
to form part  
of the personal  
estate.

2. Where realty is directed to be converted and form part of the personal estate, it will be subject to all the limitations of the personal estate, and will pass by the residuary bequest.

*Kidney v. Coussmaker*, 1 Ves. Jun. 436; *Robinson v. Governors of London Hospital*, 10 Ha. 19, 27; see *Bright v. Larcher*, 3 De G. & J. 148; *Field v. Peckett*, 29 B. 568; *quære*, whether *Collins v. Wakeman*, 2 Ves. Jun. 688, would be followed. Chap. XXI.

But notwithstanding a direction that moneys to arise from a sale of realty are to be considered as part of the personal estate, they will not pass under a gift of the residuary personalty, if the residuary gift is followed by a gift of the moneys arising from the sale. *Amphlett v. Parke*, 4 Russ. 75; 2 R. & M. 221.

3. Upon the question whether realty directed to be converted is converted for all the purposes of the will, the cases run into fine, though, perhaps, not irreconcilable distinctions.

a. When conversion is directed at the death of a tenant for life, and the proceeds are to be divided among a class of persons who at that time may not be in existence, or may never come into existence; for instance, such of the children of the tenant for life as attain twenty-one, conversion is not merely for the purpose of division, but for all the purposes of the will, and the property passes to the residuary legatee as personalty. *Wall v. Colshead*, 9 De G. & J. 683.

Whether converted realty passes by a residuary bequest.

Direction to convert at a certain time and divide among persons who may not then be in existence.

b. Where there is an absolute direction to sell realty not limited to any particular purpose, the surplus proceeds will pass to the residuary legatee. *Singleton v. Tomlinson*, 3 App. C. 404, affirming *S. C. nom. Watson v. Arundell*, 1 R. 11 Eq. 53.

Absolute direction to sell.

c. If the realty is to be sold for a particular purpose, for instance, to pay legacies, the surplus proceeds will not pass under a gift of residuary personalty unless the gift is so expressed as to show that the proceeds of sale of land are intended to be included. *Mallabar v. Mallabar*, Ca. t. Talb. 78; *Maugham v. Mason*, 1 V. & B. 410; *Collis v. Robins*, 1 De G. & S. 131.

Sale for certain purposes.

d. Where realty and personalty are once for all blended together and directed to be converted, interests undisposed of will pass to the residuary legatee. *Durour v. Motteux*, 1 Ves. Sen. 320; 1 S. & St. 292, n.; *Byam v. Munton*, 1 R. & M. 503; *Green v. Jackson*, 5 Russ. 35; 2 R. & M. 238; *Salt v. Chattaway*, 3 B. 576; *Spencer v. Wilson*, 16 Eq. 501; *Court v. Buckland*, 45 L. J. Ch. 214; *Norreys v. Franks*, 1 R. 9 Eq. 18.

Gift of a mixed fund to be converted.

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*Cruse v. Barley*, 3 P. W. 20, may probably be accounted for on the principle that the gift of residue there was not of a real residue, but of the residue of a real residue. The residue had in effect already been given among the testator's children, and the subsequent words only indicated what shares in that residue each was to take, and upon lapse of one of those shares a portion of the residue was thereby undisposed of.

Realty directed to be converted the subject of a separate gift.

*e.* But when the realty directed to be converted and the personalty are the subject of separate gifts, and are treated as distinct funds, the residuary bequests will not carry interests undisposed of in the realty. *Maugham v. Mason*, 1 V. & B. 410; *Hutcheson v. Hammond*, 3 B. C. C. 128.

Realty and personalty blended but treated as distinct funds.

*f.* Intermediate between the last two classes of cases falls a class of cases where the real and personal estates are blended together, but the two funds are treated as distinct and independent, in which case the interests in the realty undisposed of will not pass to the residuary legatee.

Thus, though realty and personalty are blended together and directed to be converted, if the proceeds of the sale of the realty are treated as a separate fund for certain payments, interests undisposed of will not pass under the gift of the residuary personalty. *Dixon v. Dawson*, 2 S. & St. 327.

So, too, if there is a gift as well of the residue of the moneys to arise from the sale as of the residue of the personal estate, the latter residue will not carry legacies given out of the proceeds of sale which lapse. *Gravenor v. Hallum*, Amb. 643; *Gibbs v. Rumsey*, 2 V. & B. 294.

But the fact that the residue of the money to arise from the sale of realty is expressly given will not prevent such money from passing under the residuary personalty, if the residue of the money is only mentioned as part of the enumeration of the things of which the residuary personalty consists. *Kennell v. Abbott*, 4 Ves. 802.

### III. CONVERSION IS LIMITED TO THE PURPOSES OF THE WILL.

Who is entitled to property directed to be converted

Conversion directed by a testator is a conversion only for the purposes of the will, and all that is not wanted for these purposes goes to the persons who would have been entitled

but for the will. Therefore where real and personal estate is directed to be sold, and after payment of debts and legacies the residue is given to persons, some of whom die before the testator, the lapsed shares go proportionally to the heir-at-law and next of kin. *Ackroyd v. Smithson*, 1 B. C. C. 508. Chap. XXI.  
but undisposed of by the will.

If the devise of a share to a person who is the heir is revoked, whereby there is a lapse, the heir nevertheless takes so much as is derived from realty. *Gordon v. Atkinson*, 1 De G. & S. 478.

A declaration that the proceeds of the sale of realty are to be part of the personal estate for all purposes will not deprive the heir of such proportion of the proceeds of realty as is undisposed of, there being no express gift to the next of kin. *Shallcross v. Wright*, 12 B. 508; *Taylor v. Taylor*, 3 D. M. & G. 190; overruling *Phillips v. Phillips*, 1 M. & K. 649. Declaration that proceeds of sale of realty are to be personal estate.

Nor will a declaration, that the proceeds of the sale shall not lapse for the benefit of the heir, exclude the heir, if a disposition is intended to be made of the property. *Flint v. Warren*, 16 Sim. 184; *Fitch v. Weber*, 6 Ha. 145.

But if the surplus of the sale of real estate is directed to be personal estate, and given to the executors, they take in trust for the next of kin. *Countess of Bristol v. Hungerford*, 2 Vern. 645; corrected 3 P. W. 194; 1 De G. & S. 482.

The converse rule applies to the case of money to be invested in land, which, upon failure of the particular dispositions, or any of them, results so far for the next of kin. *Cogan v. Stephens*, 5 L. J. Ch. 17; 1 B. 482, n.; *Hereford v. Rarenhill*, 1 B. 481; 5 B. 51; *Head v. Godlee*, Johns. 586; *Countess of Bective v. Hodgson*, 10 H. L. 656. Money to be invested in land.

#### IV. HOW THE HEIR AND NEXT OF KIN TAKE PROPERTY DIRECTED TO BE CONVERTED.

1. When a conversion of realty is directed and the objects of the conversion wholly fail, the heir takes the property as realty, whether a sale has taken place or not. *Davenport v. Coltman*, 12 Sim. 610. In *Chitty v. Parker*, 2 Ves. Jun. 271; 4 B. C. C. 411, the question appears to have been whether Where the purpose of the conversion wholly fails.

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the real and personal estate was applicable rateably to payment of debts. See, as to that case, 4 D. M. & G. 411; L. R. 9 Ex. p. 35.

Where it fails partially.

2. But where some purpose of the will can be answered by a sale, where, for instance, there is a tenant for life or one of several tenants in common who survives the testator, the heir takes the property whether converted or not as personalty. *Wright v. Wright*, 16 Ves. 188; *Smith v. Claxton*, 4 Mad. 484; *Wilson v. Coles*, 28 B. 215; *A.-G. v. Lomas*, L. R. 9 Ex. 29; *Hamilton v. Foote*, I. R. 6 Eq. 572; *In re Lewis*; *Foxwell v. Lewis*, 30 Ch. D. 654; *In re Richerson*; *Scales v. Heyhoe*, (1892) 1 Ch. 379.

Upon this principle, where a sum is directed to be raised out of devised lands and is given for life with remainders, and the remainders fail, upon the death of the tenant for life the sum charged belongs to the devisee of the land as personalty. *In re Newberry's Trust*, 5 Ch. D. 746.

At what time it is to be ascertained whether the purposes have failed.

It has been said that the testator's death is the time at which it must be ascertained whether the purposes for which conversion is directed have failed or not, and therefore if at that time those purposes may possibly take effect, the heir takes as money, though they may subsequently fail. *Carr v. Collins*, 7 Jur. 165. The exact point, however, was not there decided, since, in that case, conversion was effectual with respect to the legacy of 1,000*l*.

Money to be laid out in land goes to the next of kin as land.

3. In the same way personalty laid out in land in pursuance of a direction in the will, but only partially disposed of, will go to the next of kin as land. *Cogan v. Stephens*, 5 L. J. Ch. 17; *Curteis v. Wormald*, 10 Ch. D. 172, overruling *Reynolds v. Godlee*, Johns. 536, 582; *In re Skerrett's Trusts*, 15 L. R. Ir. 1.

#### V. CONVERSION BY EVENTS EXTRANEOUS TO THE WILL.

Contract for sale.

A binding contract for the sale of land belonging to the testator, though not completed at his death, converts the land, and the proceeds of sale fall into the personal residue. *Farrar v. Earl of Winterton*, 5 B. 1. See, too, the Chapter on Ademption.

If the heir adopts and carries into effect a parol contract entered into by the testator, the land is converted, and the heir is not entitled to the purchase-money. *Frayne v. Taylor*, 12 W. R. 287; 38 L. J. Ch. 228; 10 Jur. N. S. 119; *In re Harrison*; *Parry v. Spencer*, 34 Ch. D. 214. Chap. XXI.

If the contract is binding on the testator at his death, but the purchaser loses his right to specific performance by laches, the land is converted and goes to the next of kin. *Curre v. Bowyer*, 5 B. 6, n.

If the testator's title turns out to be bad as to part of the property sold, and the contract is rescinded on this ground after his death, there is no conversion. *In re Thomas*; *Thomas v. Howell*, 34 Ch. D. 166; see *Crowe v. Menton*, 28 L. R. Ir. 519.

Upon the question whether there would be conversion where the contract could be enforced against, but not by, the testator, see *Lysaght v. Edwards*, 2 Ch. D. 499, 507; *Edwards v. West*, 7 Ch. D. 858, 862; *Crowe v. Menton*, 28 L. R. Ir. 519, 524. Contract enforceable against, not by, testator.

In the case of purchases of the testator's land under compulsory powers, except so far as the purchase-money may remain subject to a trust for reinvestment in land, a notice to treat under the Lands Clauses Act, followed by an agreement as to the price to be paid, converts the land, though there may be no sufficient memorandum in writing of the contract to satisfy the Statute of Frauds. *Ex parte Hawkins*, 13 Sim. 569; *Re Manchester and Southport Railway*, 19 B. 365; *In re Bagot's Settlement*, 31 L. J. Ch. 772; *Watts v. Watts*, 17 Eq. 217. Purchases under compulsory powers.

A mere notice to treat is not sufficient to effect a conversion, nor is a notice to treat followed by a statement on the part of the vendor of the sum he is willing to take, if he dies before his offer has been accepted. *Haynes v. Haynes*, 1 Dr. & Sm. 426; *Re Battersea Park Acts*; *Ex parte Arnold*, 32 B. 591; see *Coyne v. Coyne*, 1 R. 10 Eq. 496. Notice to treat.

And an agreement, if land is taken under compulsory powers, to pay so much an acre for it, will not cause conversion. *Ex parte Walker*, 1 Dr. 508.

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Exercise of  
option to  
purchase.

The doctrine of conversion by a contract for sale has been extended to cases where there is an option of purchase which is afterwards exercised.

Thus where land included in a general devise is subject to a lease with a power for the lessee to buy the land and the option of purchase is exercised by the lessee after the testator's death, the land is converted as from the date when the option is exercised and the proceeds of sale fall into the personal residue. *Lawes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 591; *Collingwood v. Row*, 26 L. J. Ch. 649; *In re Isaacs*; *Isaacs v. Reginall*, (1894) 3 Ch. 506.

The case is the same whether the option to purchase is given before or after the date of the will. *Weeding v. Weeding*, 1 J. & H. 424.

The rule applies though the purchase-money is payable to the testator, his heirs, or assigns. *Townley v. Bedwell*, 14 Ves. 591; *Weeding v. Weeding*, 1 J. & H. 424.

It is immaterial that the option does not arise until after the testator's death. *In re Isaacs*; *Isaacs v. Reginall*, *supra*.

Somewhat different considerations apply to cases of specific gifts. See the Chapter on Ademption.

The doctrine of *Lawes v. Bennett* has not met with approval, and though it must be applied in similar cases, it is not to be extended. See *Edwards v. West*, 7 Ch. D. 858, p. 863; *In re Adams & Kensington Vestry*, 27 Ch. D. 394.

Redemption  
money for  
rent-charge.

In the case of a rent-charge redeemable on payment of a lump sum, it was held upon the language of the instrument giving the right to redeem that the heir of the last owner of the rent-charge was entitled to the redemption money. *In re Graves Minors*, 15 Ir. Ch. 357; see *In re Crofton*, 1 Ir. Eq. 304.

Intermediate  
profits until  
conversion.

In cases where conversion takes place the devisee is entitled to the rents between the testator's death, and the completion of the purchase. *Watts v. Watts*, 17 Eq. 217.

If the conversion is brought about by the exercise of an option to purchase the devisee takes the rents and profits until the option is exercised. *Townley v. Bedwell*, 14 Ves. 591.

Interest on  
purchase-  
money.

Interest payable by the purchaser on his purchase-money does not go to the devisee, but forms part of the personal



estate. *Townley v. Bedwell*, 14 Ves. 591; *Puxley v. Puxley*, 1 N. R. 509. Chap. XXI.

Since the Act 40 & 41 Vict. c. 34, which applies to testators dying after the 31st December, 1877, if a testator contracts to buy realty and dies before the purchase is completed and the vendor has a lien for the purchase-money, it seems that the purchase-money as between persons entitled to the real and personal estate is to be borne by the realty purchased. *In re Cockcroft*; *Broadbent v. Groves*, 24 Ch. D. 94. Contract to purchase realty.

In cases not within that Act, if there is a contract to purchase realty, which is binding on the testator at his death, the purchase-money is converted into realty, and the heir or devisee is entitled to it, though the vendor may retain a power of rescission which is actually exercised after the testator's death. *Whittaker v. Whittaker*, 4 B. C. C. 30; *Garnett v. Acton*, 28 B. 338; *Hudson v. Cook*, 13 Eq. 417.

If the contract goes off owing to a defect in the title, there is no conversion, and a devisee has no right to waive the want of title, and call upon the executor to complete. *Broome v. Monck*, 10 Ves. 597.

If the testator has contracted with a builder for the building of a house on a piece of land devised by him, the devisee is entitled to have the contract performed out of the personal estate, whether the Court would decree specific performance of the contract or not; but this principle does not extend to a contract to build on land not belonging to the testator. *Holt v. Holt*, 2 Vern. 322; *Cooper v. Jarman*, 3 Eq. 98; *In re Day*; *Sprake v. Day*, (1898) 2 Ch. 510; see *Re Tann*, 7 Eq. 434. Contract to build a house.

Upon the same principles, where certain property is after the date of the will converted into personalty by Act of Parliament, the property passes as personalty, though the conveyances required by the Act may not have been executed. *Cadman v. Cadman*, 13 Eq. 470; see *Frewen v. Frewen*, 10 Ch. 610. Conversion under statutory powers.

Where realty has been rightfully converted, whether by a trustee in bankruptcy or under an order of the Court, it passes as personalty, and in the latter place the conversion takes Conversion by trustee in bankruptcy or by order of Court.

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place as from the date of the order absolute, but not from the date of an order *nisi* though afterwards made absolute. *Banks v. Scott*, 5 Mad. 493; *Steed v. Preece*, 18 Eq. 192; *Arnold v. Dixon*, 19 Eq. 113; *Hyett v. Mehin*, 25 Ch. D. 735; *In re Beamish's Estate*, 27 L. R. Ir. 326; *In re Henry's Estate*, 31 L. R. Ir. 158.

Where more than was necessary has been sold under a decree, for instance for payment of a mortgage debt, the surplus proceeds of sale retain their former character. *Cooke v. Dealey*, 22 B. 196; *Jerny v. Preston*, 13 Sim. 356; *Scott v. Scott*, 9 L. R. Ir. 367; but see *Steed v. Preece*, *supra*.

Sale by order  
of Court.

A sale by order of the Court for the convenience of the parties and not for the purposes of the suit, converts the property out and out. *Ferguson v. Benyon*, 17 L. R. Ir. 212.

Sale under  
Partition Acts.

As regards a sale under the Partition Acts, sect. 8 of the Act of 1868 (31 & 32 Vict. c. 40) incorporated sects. 23—25 of the Settled Estates Act (19 & 20 Vict. c. 20), providing for the reinvestment of the purchase-money in land. A sale, therefore, under the Act of 1868, did not convert the share of a person under disability. *Foster v. Foster*, 1 Ch. D. 558; *In re Barker*, 17 Ch. D. 241.

Sect. 6 of the Act of 1876 (39 & 40 Vict. c. 17) authorises a request for sale to be made in the case of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorised by order in lunacy), or other person authorised to act on behalf of the person under such disability. It has been held that a request made by a married woman under the section converts her share (a), but it seems a similar request by a guardian of an infant has not this effect (b). *Wallace v. Greenwood*, 16 Ch. D. 362 (a); *Howard v. Jalland*, W. N. (1891) 210; *In re Norton*; *Norton v. Norton*, (1900) 1 Ch. 101 (b).

Land of  
lunatic.

As to the effect of taking the lands of a lunatic under the Land Clauses Act, under a notice to the lunatic and not to the committee, see *Ex parte Flamank*, 1 Sim. N. S. 260; *In re Tugwell*, 27 Ch. D. 309.

Money of a lunatic laid out under an order in lunacy in the purchase of land, with a declaration that the land is to be considered personal estate, remains personal estate of the lunatic (a); but a contract by a lunatic to buy land, confirmed by an order in lunacy, converts the purchase-money into land (b). *A.-G. v. Marquis of Ailesbury*, 12 App. C. 672 (a); *Baldwyn v. Smith*, (1900) 1 Ch. 588 (b).

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Money of  
lunatic  
invested  
in land.

As to the effect of the conversion of renewable leaseholds for lives and years held in *quasi* tail into a fee under statutory powers, see *Morris v. Morris*, I. R. 6 C. L. 73; *ib.* 7, p. 295; *In re Dane's Estate*, I. R. 10 Eq. 207; *Batteste v. Maunsell*, I. R. 10 Eq. 314.

Conversion  
into fee  
simple of  
renewable  
leaseholds  
held in *quasi*  
tail.

## CHAPTER XXII.

GIFTS TO PERSONÆ DESIGNATÆ AND TO PERSONS  
FILLING A CERTAIN CHARACTER.

## A. GIFTS TO PERSONÆ DESIGNATÆ.

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What evidence  
is admissible.

I. FOR the purpose of ascertaining the persons to take under certain names and descriptions, evidence is admissible: firstly, of all the facts known to the testator at the time of making his will; secondly, of all the peculiar names or phrases which the testator was in the habit of using, whether nicknames or names erroneously applied to certain objects, provided in the latter case there are no persons to whom the names correctly apply, and for this purpose any documents or writings of the testator, including a prior will, are admissible. *Reynolds v. Whitan*, 16 L. J. Ch. 484; *Re Waller*; *White v. Scoles*, 80 L. T. 701; see *Feltham's Trusts*, 1 K. & J. 582; *Gregory's Will*, 34 B. 600.

Evidence is also admissible of the objects the testator was likely to benefit: evidence, for instance, to which of two societies both insufficiently answering a certain description, the testator was in the habit of subscribing. *Kilvert's Trusts*, 12 Eq. 188; 7 Ch. 170.

Person fully  
answering  
the descrip-  
tion will take  
as *persona*  
*designata*.

If among the objects thus shown to be known to the testator there is some one who fully answers the description in the will, evidence to show that another person was meant is not admissible. *Delmare v. Robello*, 1 Ves. Jun. 412; 3 B. C. C. 446; *Holmes v. Custance*, 12 Ves. 279; *In bonis Peel*, 2 P. & D. 46.

A legatee is sufficiently described by his first Christian name, or even by initials. *Mostyn v. Mostyn*, 5 H. L. 155; *Abbot v. Massie*, 3 Ves. 148.

It is, on the other hand, perfectly clear that the mere fact of a person fully answering to the description in the will (the description being of a *persona designata*) will not entitle him to take under it if it appears from the admissible evidence that the testator was not aware of his existence. Therefore, under a gift to Elizabeth, daughter of Mary Beynon, or to my nephew Joseph, neither Elizabeth, an illegitimate daughter, nor a nephew called Joseph, will take if it appears that the testator was not aware of their existence. *Doe d. Thomas v. Beynon*, 12 Ad. & E. 431; *Grant v. Grant*, L. R. 5 C. P. 380, 727.

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But not if he was unknown to the testator.

The testator may have habitually called certain persons or things by peculiar names by which they are not commonly known, and of this evidence is admissible; thus, where the gift was to Catherine Earnley, evidence was admitted to show whom the testator was in the habit of calling by that name. *Beaumont v. Fell*, 2 P. W. 141; *Masters v. Masters*, 1 P. W. 421; *Dowset v. Sweet*, Amb. 175; *Lee v. Pain*, 4 Ha. 251; *Kell v. Charmer*, 23 B. 195.

Evidence of nickname, &c., is admissible.

But if the testator merely designates legatees by letters having no reference to their names, there is a patent ambiguity which may not be explained by evidence. *Clayton v. Nugent*, 13 M. & W. 200; *Sullivan v. Sullivan*, I. R. 4 Eq. 457.

But not evidence to explain a patent ambiguity.

Where a blank is left for the name of a legatee, no evidence of intention is admissible, and the gift is void for uncertainty. *Winn v. Littleton*, 2 Ch. Ca. 51; *Baylis v. Attorney-General*, 2 Atk. 239; *Hunt v. Hort*, 3 B. C. C. 311; *Taylor v. Richardson*, 2 Dr. 16.

Blanks may not be supplied.

Where, however, there is a clear gift to a certain class, and an intention is expressed of including or excluding certain persons whose names are left in blank, the clause of inclusion or exclusion only is void for uncertainty, and the gift to the class is good. *Illingworth v. Cooke*, 9 Ha. 37; *Gill v. Bagshaw*, L. R. 2 Eq. 746.

But if the testator goes on to define the class by name, and inserts the names of persons who cannot alone be said to constitute the class, leaving blanks for other names, the gift is void for uncertainty; for instance, if the gift be to my

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The fact that a blank is left for the Christian name, or for the surname, of the legatee will not avoid the legacy if there is no doubt to whom the rest of the name applies. *Price v. Page*, 4 Ves. 680; *Phillips v. Barker*, 1 Sm. & G. 582, where the gift was to — Davis, daughter of S. Davis, and the testator knew only of one daughter at the date of the will. *In bonis De Rosaz*, 2 P. D. 66; see *Re Gregson's Trusts*, 12 W. R. 935.

Although a blank is left for the name of a legatee, the Court may be able from the context to ascertain who was intended to take. *In re Harrison*; *Turner v. Hellard*, 30 Ch. D. 390; *Furniss v. Phear*, 36 W. R. 521.

Inaccurate  
description.

II. Where the legatee is inaccurately named or described, so that there is no one who fully answers the name or description, the Court will if possible gather from the contents of the will and the surrounding circumstances who was meant. *Ryall v. Hannam*, 10 B. 536; *Camoy's v. Blundell*, 11 Sim. 467; 1 Ph. 279; 1 H. L. 778; *Stringer v. Gardiner*, 27 B. 35; 4 De G. & J. 468; *Douglas v. Fellows*, Kay, 114; *Dooley v. Mahon*, I. R. 11 Eq. 299; *In re Trohill*, 3 L. R. Ir. 21; *In bonis Brake*, 6 P. D. 217; *Baxter v. Morgan*, 7 L. R. Ir. 501; *In re Taylor*; *Cloak v. Hammond*, 34 Ch. Div. 255; *In bonis John Chappell*, (1894) P. 98.

Under a gift to the daughters of my friend Ignatius Scoles, where Ignatius Scoles was a Jesuit priest but had sisters, it was held, with the assistance of earlier wills, that the sisters were entitled. *Re Waller*; *White v. Scoles*, 80 L. T. 701.

In determining whether a legatee fully answers the description, the whole will must be considered. Thus, though there may be a person precisely answering to the name given by the testator, it may appear from other parts of the will that that person could not have been intended. *Charter v. Charter*, L. R. 2 P. & D. 315; *ib.* 7 H. L. 364; *In re Wolverton Mortgaged Estates*, 7 Ch. D. 197.

The fact that a legatee has once been accurately described will not prevent his taking another gift under a less full or an inaccurate description. *Doe d. Morgan v. Morgan*, 1 Cr. & M. 235; *Careless v. Careless*, 19 Ves. 604; 1 Mer. 384. Chap. XXII.

But it will if the two descriptions are so different as to raise a strong probability that the same legatee cannot have been meant. *Lee v. Pain*, 4 Ha. 254.

If a legatee is mentioned by name and an erroneous description is added, the name will prevail if there is a person fully answering to the name and no one to answer the description. *Veritas nominis tollit errorem demonstrationis*. *Standen v. Standen*, 2 Ves. Jun. 589; 6 B. P. C. 193; *Doe d. Gains v. Rouse*, 5 C. B. 442; *Re Blackman*, 16 B. 377; *Re Ingle's Trusts*, 11 Eq. 578. Name accurate, superadded description inaccurate.

Similarly, if there is no one to answer the name, a person satisfying the description will take. *Pitcairne v. Brase*, Finch, 408; *Doutset v. Sweet*, Amb. 175; *Parsons v. Parsons*, 1 Ves. Jun. 266; *Garth v. Meyrick*, 1 B. C. C. 30; *Doe d. Cook v. Daurers*, 7 East, 229. Name inaccurate, superadded description accurate.

If there is a gift to a society by an erroneous name the Court will, if possible, discover what society was intended. *Wilson v. Squire*, 1 Y. & C. C. 654; *Bunting v. Marriott*, 19 B. 163; *Kilvert's Trusts*, 12 Eq. 183; 7 Ch. 170; see *Coldwell v. Holme*, 2 Sm. & G. 31; *Makeown v. Ardagh*, 1 R. 10 Eq. 445. Misdescription of society.

Where a testatrix gave 200*l.* to each of two unincorporated societies which amalgamated between the date of her will and death, it was held that the amalgamated society took both legacies. *Re Joy*; *Purday v. Johnson*, 60 L. T. 175.

III. If there are several persons who accurately answer the whole description, there is an equivocation, and evidence of the testator's intention is admissible. *Lord Cheney's Case*, 3 Rep. p. 187; fol. 68a; *Doe d. Morgan v. Morgan*, 1 Cr. & M. 235; *Doe d. Gord v. Needs*, 2 M. & W. 129; *Doe d. Allen v. Allen*, 12 A. & E. 451; *Jones v. Newman*, 1 W. Bl. 60; *Jefferies v. Michell*, 20 B. 15; *In bonis Ashton*, (1892) P. 83; *Phelan v. Slaterry*, 19 L. R. Ir. 177. Equivocation.

And if part of the description applies equally to two persons and the rest of it applies to no one, the portion which has no

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application may be considered away, so as to raise an equivocation and make evidence of intention admissible. *Price v. Page*, 4 Ves. 680; *Still v. Hoste*, 6 Mad. 192; *Careless v. Careless*, 19 Ves. 604; 1 Mer. 384. These cases are referred to this head by Lord Abinger, C.B., in *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 368, 370; but *quere* whether *Price v. Page* was not a case of equivocation strictly, and whether the latter two cases were not mere cases of misdescription. At any rate, in them no evidence of intention proper was offered, but only evidence of surrounding circumstances.

Equivocation may arise though two persons may not both answer the same description with equal accuracy.

To raise a case of equivocation it is sufficient, if two persons equally answer the description in a popular sense.

Thus a father and son both equally answer the description John Smith, though properly speaking the son is John Smith the younger. *Jones v. Newman*, 1 W. Bl. 60.

So a person whose name was W. M. and one whose name was W. J. R. B. M. were both held equally to answer the description W. M., since a man is popularly known by his first Christian name. *Bennett v. Marshall*, 2 K. & J. 740.

The will may on the face of it raise a case of equivocation.

It makes no difference that the will itself shows that there are two persons equally answering a given description. For instance, if there is a gift to G. G., son of J. G., another to G. G., son of G. G., and a third to G. G., son of G. *Doe d. Gord v. Needs*, 2 M. & W. 129.

But parol evidence is not admissible to show to which of two antecedents in the will a word of reference is to be referred, if, for instance, two Ann Collins's have been mentioned, and there is a gift to the said Ann Collins. *Fox v. Collins*, 2 Ed. 107; *Castledon v. Turner*, 3 Atk. 957.

An apparent case of equivocation may be explained by the will itself.

No case of equivocation arises if it can be gathered from the will which of several persons equally answering the name is meant, as in a devise to M. W., my brother, and to Simon, my brother's son—the son of the brother just mentioned being clearly indicated. *Doe d. Westlake v. Westlake*, 4 B. & Ald. 57; *Healy v. Healy*, 1 R. 9 Eq. 418.

And, similarly, if a legatee has once been accurately described, and the same name is afterwards mentioned without the description, evidence is not admissible to show that a



different legatee of that name was meant. *Webber v. Corbett*, Chap. XXII. 16 Eq. 515; *Richardson v. Watson*, 4 B. & Ad. 787.

But the case is different if there is first a gift to A. B. and then a gift to A. B. of X., and there are two A. B.'s, one of X. and one not. *Doe d. Morgan v. Morgan*, 1 Cr. & M. 235.

Further, it is clear that if there were a gift to my "nephews" as a class, evidence that the testator generally applied the term to his wife's nephews would not raise a case of equivocation so as to make evidence of intention admissible as between nephews proper and wife's nephews. *Beachcroft v. Beachcroft*, 1 Mad. 430, which may be cited to the contrary, so far as it cannot be upheld *ex visceribus* of the will, has been generally disapproved.

Whether nephews proper and a wife's nephews are both equally nephews.

It is equally clear that if the testator at the date of his will had only a wife's nephew called Joseph, the subsequent birth of a brother's son called Joseph would not entitle the latter to take under a gift to my nephew Joseph. And the result would be the same if the testator at the date of his will was not aware that his brother had a son called Joseph. *Doe d. Thomas v. Beynon*, 12 Ad. & E. 431; *Grant v. Grant*, L. R. 5 C. P. 380; *ib.* 727. My nephew Joseph is clearly *persona designata*, and the question then is, whom did the testator mean to point out?

Evidence of intention, though in fact admitted in *Grant v. Grant*, was not necessary for the decision, since the testator cannot have meant to benefit a person of whose existence he was not aware, under a particular name and description, and therefore a case of equivocation cannot be said to have arisen.

Whether evidence of intention would be admissible if the testator was aware at the date of his will that both his brother and his brother-in-law had sons called Joseph is doubtful, though the judgment in *Grant v. Grant* seems to imply that it would.

IV. If there is a gift by name, with a particular description superadded, and there is some one who answers to the name and some one who answers to the description, no evidence of intention is admissible. *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363; *Bernasconi v. Atkinson*, 10 Ha. 345; *Charter*

Case where part of a description applies to one person and part to another.

**Chap. XXII.** v. *Charter*, L. R. 2 P. & D. 315; *ib.* 7 H. L. 364; see *In bonis John Chappell*, (1894) P. 98.

In some cases, if there is nothing to point out one person more than the other, the gift will be void for uncertainty. *Thomas v. Thomas*, 6 T. R. 671; *Drake v. Drake*, 8 H. L. 172. See *Cope v. Henshaw*, 35 B. 420; *Re Ely*; *Tottenham v. Ely*, 65 L. T. 452.

In such cases the rule that the name is to prevail against an error of demonstration can only apply if it is clear that the error is in the demonstration. And, therefore, either the name or the description will prevail, according as it is reasonably certain that the mistake is more likely to be made in the name than in the description, or *vice versâ*.

Gift to A.,  
second son of  
B., where A.  
is the third  
son of B.

If the gift is to A. B., second son of C. D., and A. B. is the third son, and there is nothing either in the will or in the relations of the second and third sons to the testator to point out one more than the other, the name will prevail. *Doe d. Chevalier v. Huthwaite*, 8 Taunt. 306; 2 Moo. 304; see 3 B. & Ald. 632; *Pryce v. Newbolt*, 14 Sim. 354; *Garland v. Beverley*, 9 Ch. D. 213; *In re Lyon's Trusts*, 48 L. J. Ch. 245; see, too, *Farrer v. St. Catharine's Coll.*, 16 Eq. 19.

But it may appear from the will or the relations of the second and third son to the testator, or from the fact that one of the sons was otherwise provided for, whether the name or description was erroneous. Thus, if one of the two was godson or well known to the testator, the other not, the former takes. *Bernasconi v. Atkinson*, 10 Ha. 345; *Gregory's Will*, 34 B. 601; *Hodgson v. Clarke*, 1 D. F. & J. 394.

So if the testator, after a limitation to A. B., the second son of C., limits remainders to the third and fourth sons and so on, the argument is strong that the description and not the name was to prevail. *Bradshaw v. Bradshaw*, 2 Y. & C. Ex. 72; *Neeld v. Neeld*, W. N. 1878, 219.

But this argument was held not to apply where the limitations were to R. G. fourth son to G. G. in fee in case he should attain twenty-one, but if he should die under that age to the fifth son in fee, and so on; and accordingly R. H. G., the third son, took. *Gillett v. Gane*, 10 Eq. 29.

If, on the other hand, the description is such as to particularise a certain person, and to leave no doubt as to which of two persons was meant, the description will prevail. *Smith v. Coney*, 6 Ves. 42; *Lee v. Pain*, 4 Ha. 258; *Adams v. Jones*, 9 Ha. 485; *Charter v. Charter*, L. R. 2 P. & D. 315; *ib.* 7 H. L. 364.

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Where the description is careful and elaborate it prevails.

And though there may be a person answering to the name, if there are in the will expressions which show that he could not have been meant, the case falls under the same head, and it becomes a question whether the name or the description is to prevail. *Charter v. Charter*, L. R. 2 P. & D. 315; *ib.* 7 H. L. 364.

If the description is such as itself to supply a motive for the gift, the description will prevail. *Nunn's Trusts*, 19 Eq. 331; see *Re Fry*, 22 W. R. 679, 813; *Re Blayney's Trust*, I. R. 9 Eq. 413.

Where the description supplies a motive for the gift.

#### B. GIFTS TO PERSONS FILLING A CERTAIN CHARACTER.

Under a gift to Lord S. as an heirloom, the person who was Lord S. at the date of the will was held to be meant. *In re Whorwood*; *Ogle v. Lord Sherborne*, 34 Ch. D. 446.

Gift to Lord S.

The mere fact that a gift is made to a named legatee in a certain character, as for instance to my wife A., does not avoid the legacy if the legatee does not happen to fill the character. *Schloss v. Stiebel*, 6 Sim. 1; *Giles v. Giles*, 1 Kee. 685; *Re Pitt's Will*, 27 B. 576; *In re Boddington*; *Boddington v. Clairat*, 22 Ch. D. 597; 25 Ch. D. 685.

Gift to a legatee in a certain character.

Where the testator was separated from his wife, and had gone through the ceremony of marriage with another woman, the latter took under a residuary gift "to my wife." *In bonis Howe*, 38 W. R. 48.

If the legatee fraudulently assumed the character of wife for the purpose of deceiving the testator, and procuring a legacy, the question of fraud must be raised in the Court of Probate. A Court of Construction has no jurisdiction to go into the question of fraud when the will has once been proved. *Meluish v. Milton*, 3 Ch. D. 27, overruling *Kennell v. Abbott*,

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Servants and  
employés.

4 Ves. 802 ; *Wilkinson v. Joughin*, L. R. 2 Eq. 319 ; see *Rishton v. Cobb*, 5 M. & Cr. 145 ; *In re Boddington* ; *Boddington v. Clairat*, 25 Ch. D. 685 ; and see *ante*, pp. 24, 75.

A gift to servants or employés has been held, upon the context of the will in each case, to refer to servants in the testator's employment at the date of his will (a), at his death (b), both at the date of the will and death (c), and at any time (d). *Parker v. Marchant*, 1 Y. & C. C. 290 (a) ; *In re Marcus* ; *Marcus v. Marcus*, 56 L. J. Ch. 880 ; 57 L. T. 899 (b) ; *Jones v. Henley*, 2 Ch. Rep. 162 (c) ; *In re Sharland* ; *Kemp v. Rozey*, (1896) 1 Ch. 517 (d).

The word servants is not necessarily confined to servants living in the house. It has been held to include a farm-bailiff, a gardener and under-gardener, and a house-steward. *Bulling v. Ellice*, 9 Jur. 936 ; *Thrupp v. Collett*, 26 B. 147 ; *Armstrong v. Clavering*, 27 B. 226.

Such persons as stewards of Courts, a coachman provided by a job master, or a boy occasionally employed, are not included under the term. *Townshend v. Windham*, 2 Vern. 546 ; *Chilcott v. Bromley*, 12 Ves. 114 ; *Thrupp v. Collett*, 26 B. 147.

Domestic  
servants.

The term domestic or household servants excludes out-door servants. *Ogle v. Morgan*, 1 D. M. & G. 359 ; *Re Drax* ; *Savile v. Yeatman*, 57 L. T. 475.

Gift of a  
year's wages.

If the gift is of a year's wages it will not include servants who are hired and paid by the week. *Booth v. Dean*, 1 M. & K. 560 ; *Blackwell v. Pennant*, 9 Ha. 551 ; *Breslin v. Waldron*, 4 Ir. Ch. 334.

Living with  
me at my  
death.

A bequest to the two servants who shall be living with me at my death, has been held to go to all living with the testator at his death, though there may have been only two at the date of the will. *Sleech v. Thorington*, 2 Ves. Sen. 560.

Servants living with me at my death means servants then in the testator's service. They need not live in the same house with him. *Townshend v. Windham*, 2 Vern. 546 ; *Blackwell v. Pennant*, 9 Ha. 551.

Under such a bequest servants wrongfully discharged before the testator's death, or voluntarily leaving the service, or dismissed on account of the testator's lunacy, are not entitled to

anything. *Darlow v. Edwards*, 1 H. & C. 547; *Re Serres' Estate*; *Venes v. Marriott*, 10 W. R. 751; 31 L. J. Ch. 519; *In re Hartley's Trusts*, 26 W. R. 590; 47 L. J. Ch. 610; see *In re Benyon*; *Benyon v. Grieve*, 51 L. T. 116; 32 W. R. 871. Chap. XXII.

But a servant who at the testator's death has temporarily left his house and is to return to service is entitled to the legacy. *Herbert v. Reid*, 16 Ves. 481.

In wills under the Wills Act a gift to the testator's wife must mean the person calling herself his wife at the date of the will, as a second marriage operates as a revocation of the will, and therefore a deceased wife's sister may take under the description of the testator's wife. *Pratt v. Mathew*, 22 B. 928; *Pitt's Will*, 27 B. 576; 5 Jur. N. S. 1235. Gift to the testator's wife.

But *prima facie* wife means lawful wife. *Davenport's Trusts*, 1 Sm. & G. 126.

A gift to "my wife A." is effectual though the wife may after the date of the will have procured a divorce on the ground of nullity. *In re Boddington*; *Boddington v. Clairat*, 22 Ch. D. 597; 25 Ch. D. 685.

But in the same case a gift to the wife "so long as she shall continue my widow" was held not to take effect, as the legatee never having been the testator's wife could not continue his widow.

Where a testator spoke of A.'s mistress as his wife, a gift to her "if she shall become A.'s widow" was held to take effect on her surviving A. *In re Lowe*; *Danily v. Platt*, 61 L. J. Ch. 415; 40 W. R. 475.

*Primâ facie* a gift to the wife of A. who has a wife living at the date of the will goes to that wife and no other, whether the gift is in possession or after a life interest to the husband or absolute or for life only. *Boreham v. Bignall*, 8 Ha. 181; *Burrow's Trusts*, 10 L. T. 184; *Firth v. Fielden*, 22 W. R. 622; see *In re Laffan & Downes* (1897) 1 Ir. 469. Gift to the wife or husband of a third person.

The same rule applies in the case of a husband.

If there is anything on the face of the will to show that an existing person is referred to the case is clear; for instance, a reference to the "beloved" wife of A. or a reference to daughters as the wives of named husbands. *Niblock v.* Reference to existing husband or wife.

**Chap. XXII.** *Garrett*, 1 R. & M. 629; *Bryan's Trust*, 2 Sim. N. S. 103; *Franks v. Brooker*, 27 B. 685.

Intention to include any husband or wife.

On the other hand, there may be indications of intention in the will that the testator means by wife or husband any wife or husband.

If the gift to the wife of A. is connected with a gift to his children, which is so expressed as to include his children by any wife, there is a strong argument that any wife is meant, and it was so held in a case where the capital was given absolutely to the wife and children (a); but not where a life interest to the wife was interposed (b). *In re Lyne's Trust*, 8 Eq. 65 (a); *Re Burrow's Trust*, 10 L. T. 184 (b).

And where the shares of legatees, some of whom were married and some not, were in the event of bankruptcy directed to be applied for the benefit of their wives and children, the term was held to include any wife. *Longworth v. Bellamy*, 40 L. J. Ch. 518.

And a reference to a gift in which a wife took a life interest as a gift for the benefit of A. and his family shows that the testator intended to include any wife. *In re Drew*; *Drew v. Drew*, (1899) 1 Ch. 386.

Gift to the wife of a person who is unmarried.

If there is no person answering the description of husband or wife at the date of the will or the death, the gift vests indefeasibly in the first person who answers the description. *Radford v. Willis*, 12 Eq. 105; 7 Ch. 7; see *Peppin v. Beckford*, 3 Ves. 570.

Divorced wife or husband.

Where there is a gift to a son or daughter for life with remainder to any wife or husband of the son or daughter for life, a divorced wife or husband will not take, but a divorced husband will take if the gift be to any husband with whom the testator's daughter may intermarry, where the gift is so worded as to make the marriage and not the status of husband the controlling part of the gift. *In re Morrisson*; *Hitchins v. Morrisson*, 40 Ch. D. 30; *Bullmore v. Wynter*, 22 Ch. D. 619.

Gifts to husband and wife and third person.

The construction of a gift to a husband and wife and a third person by a will made after the commencement of the Married Women's Property Act, 1882 (1st January, 1883), is not affected by the Act. *In re March*; *Mander v. Harris*, 24 Ch. D. 222;

27 Ch. D. 166 ; *In re Jupp* ; *Jupp v. Buckwell*, 39 Ch. D. 148 ; Chap. XXII.  
see *Thornley v. Thornley*, (1898) 2 Ch. 229.

“If an estate be made of land to a husband and wife, and to a third person, in this case the husband and wife have in law in their right but the moiety.” *Littleton*, sect. 291. The same rule applies to personalty, and it makes no difference whether the bequest is a joint tenancy or a tenancy in common.

Thus a bequest to A. and B. his wife and C. as tenants in common goes in moieties to A. and his wife and to C. *In re Wylde's Estate*, 2 D. M. & G. 724 ; *In re Jupp* ; *Jupp v. Buckwell*, 29 Ch. D. 148.

A bequest to A. and B. his wife and C. during their lives and the life of the survivor of them, and after the death of the survivor over, would be enough to show that the wife was to take a separate interest. *Marchant v. Cragg*, 31 B. 398.

If the bequest is to A., B. and C. and the wife of C. equally, the second “and” is looked upon as a *subcopula*, and the property goes in thirds. *Bricker v. Whatley*, 1 Vern. 233.

So, too, if the gift is to A., his wife and children, the husband and wife take one share. *Gordon v. Whieldon*, 11 B. 170 ; *Atcheson v. Atcheson*, *ib.* 485.

But a very slight evidence of intention that the wife is to take a separate share has been held sufficient to prevent the rule ; thus, if the words are to A., B., C., and his wife as tenants in common, husband and wife take several shares. *Warrington v. Warrington*, 2 Ha. 54 ; *In re Dixon* ; *Byram v. Tull*, 42 Ch. D. 306, where the earlier cases are discussed ; see, too, *Paine v. Wagner*, 12 Sim. 184.

And apparently if the words are to my son-in-law B. and my daughter P. his wife, their executors, administrators, and assigns, both take equally—the gift not being to husband and wife, but to son-in-law and daughter. *A.-G. v. Bacchus*, 9 Pr. 30 ; 11 Pr. 547.

Possibly the rule of the unity of husband and wife would not be applied to a husband and wife living under a foreign law, which recognises the separate existence of the wife. *Dias v. De Liviera*, 5 App. C. 123.

Where a husband and wife are members of a class to which

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Meaning of  
the word  
unmarried in  
a direct gift.

property is given, each takes a share. *In re Gue*; *Smith v. Gue*, 61 L. J. Ch. 510; 40 W. R. 553.

Whether a gift to unmarried children is *designatio personarum* or not depends on the language of the will. Thus, a gift to the son and unmarried daughters of A. goes to the daughters unmarried at the date of the will, the gift to the son showing that particular persons are meant. *Hall v. Robertson*, 4 D. M. & G. 781; see *Elliott v. Elliott*, 11 Ir. Ch. 482.

Where the gift designates a class ascertainable at the testator's death, the subsequent marriage of one of the class will not avoid the gift. *Jubber v. Jubber*, 9 Sim. 503; see *Blagrove v. Coore*, 27 B. 138.

The primary meaning of unmarried in a direct gift is never having been married. *Thistlethwayte's Trusts*, 1 Jur. N. S. 881; 24 L. J. Ch. 713; *Dalrymple v. Hall*, 16 Ch. D. 715; *In re Sergeant*; *Mertens v. Walley*, 26 Ch. D. 575.

Under a gift to A. B., if she be sole and unmarried, the legatee, whose marriage had been dissolved by the Divorce Court, was held entitled. *In re Lesingham's Trusts*, 24 Ch. D. 703.

And under a gift after the death of the husband to the wife so long as she continues unmarried, the wife is entitled though she has been divorced. *Knox v. Wells*, 31 W. R. 559; 48 L. T. 655.

Gift to  
"a son."

A gift to "a son" of a person will, it seems, go to the son living at the date of the gift, if there is one. *Powell v. Davies*, 1 B. 532.

If there is no son living it goes to the first son born afterwards, if he survives the testator. *Powell v. Davies*, 1 B. 532; *Ashburner v. Wilson*, 17 Sim. 204; see, too, *Russell v. Russell*, 12 Ir. Ch. 377.

Gift to one  
of a class is  
void.

A gift to one of a class, as to one of the sons of a person, is void, though only one member of the class may happen to be living at the death of the testator. *Strode v. Russell*, 2 Vern. 621, 624; *In bonis Baylis*, 2 Sw. & T. 613; *In bonis Blackwell*, 2 P. D. 72; *In re Stephenson*; *Donaldson v. Bamber*, (1897) 1 Ch. 75; see *Beauchant v. Usticke*, W. N. 1880, 14; *Smithwick v. Hayden*, 19 L. R. Ir. 490.



But a gift to one of a class who does a particular act within a given time will be good, if it can be construed as a gift to that member of the class who first does the act. *Bate v. Amherst*, Ca. t. T. Raymond, 82, where the gift was to one of my cousin's daughters that shall marry a Norton within fifteen years.

The natural meaning of first or second son is first or second in order of birth.

Gifts to a first  
or second son.

1. No difficulty arises where all the sons born are living at the testator's death, or where no sons have then been born. In the latter case, the first or second son born afterwards will take. See *Driver v. Frank*, 3 Mau. & S. 25; 8 Taunt. 468; *Alexander v. Alexander*, 16 C. B. 59; *Bennett v. Bennett*, 2 Dr. & Sm. 266.

The second born son will take as second son though his elder brother may die before he is born. *Trafford v. Ashton*, 2 Vern. 660.

2. If there is a first son at the date of the will it seems probable that he would take as *persona designata*. *Squanders v. Richardson*, 18 Jur. 714; see *Re Harris*, 2 W. R. 689.

So, too, if there were a first and second son living at the date of the will the second son would probably take under the description second son. Whether the second son at the date of the will whose elder brother had died would take as second son, *quære*.

3. If a first or second son is dead at the date of the will the term will mean first or second son at the testator's death. *King v. Bennett*, 4 M. & W. 36; *Thompson v. Thompson*, 1 Coll. 388,—where the provisions of the will were confirmed by a codicil after the death of the first born son.

4. If a first or second son is born after the date of the will and dies in the testator's lifetime, a first or second surviving son will take. *Lomax v. Holmden*, 1 Ves. Sen. 290.

But this is not the case if the testator contemplates the possibility of lapse and provides for it: for instance, by a gift to the seventh or youngest child of a person who at the date of the will had six children. *West v. Lord Primate of Ireland*, 2 Cox, 258; 3 B. C. C. 148.

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Meaning of  
the terms  
elder and  
younger.

The terms elder and younger in wills must *prima facie* be considered as used in their strict sense as applicable to age, and not in the figurative sense of anterior and posterior in order of limitation of estates. *Scarisbrick v. Lord Skelmersdale*, 4 Y. & C. Ex. 78; 2 H. L. 167; *Lyddon v. Ellison*, 19 B. 565; *Livesey v. Livesey*, 2 H. L. 419; *Longfield v. Bantry*, 15 L. R. Ir. 101.

In the case of limitations of real estate devised for life with remainders in tail, the natural meaning of eldest son is first born son. *Bathurst v. Errington*, 2 App. C. 698, 709.

Therefore, under a devise to the eldest son of A. for life with remainder to his first and other sons successively in tail, with remainder to the second and other sons of A. successively in tail, if the first born son of A. dies in the testator's lifetime without issue, A.'s second son takes an estate tail. *Meredith v. Treffry*, 12 Ch. D. 170.

The term eldest son may mean only son, as youngest child may mean only child. *Tuite v. Birmingham*, L. R. 7 H. L. 634; *Emery v. England*, 3 Ves. 232.

If the testator contemplates a younger son as becoming eldest, or if the eldest were dead at the date of the will, eldest son can, of course, not mean first born son. *Herrey-Bathurst v. Stanley*, 4 Ch. D. 251; *S. C.* sub nom. *Bathurst v. Errington*, 2 App. C. 698.

A clause shifting estates in the event of a younger son becoming the eldest son of his father applies only to a son becoming the eldest in his father's lifetime. *Bathurst v. Errington*, 2 App. C. 698.

Next  
surviving son.

When a testator has made a disposition in favour of his sons, arranging them in a descending order of birth with a gift over of their respective shares in certain events to "my next surviving son," the next younger son takes under this description. *Eastwood v. Lockwood*, L. R. 3 Eq. 487.

In the case of a bequest of personalty, whether immediate or in remainder, to the eldest child of a person, the eldest child living at the testator's death will take, though he may not have been the eldest at the date of the will. *Re Harris' Trust*, 2 W. R. 689; see *In re Whorwood*, 34 Ch. D. 446.

With regard to the time at which the class of younger children is to be ascertained— Chap. XXII.

If there is an immediate gift to younger children the class will be ascertained at the testator's death, and a child who after that time becomes eldest will not be excluded. *Coleman v. Seymour*, 1 Ves. Sen. 209; *Umbers v. Jaggard*, 9 Eq. 201. The class of younger children is to be ascertained at the time of vesting.

Similarly, if the gift is to the younger children who attain twenty-one, a child who is a younger child when it attains twenty-one will take, though it may afterwards become eldest. *Adams v. Roberts*, 25 B. 658. The decision in *Matthews v. Paul*, 3 Sw. 328, may be supported on the ground that the son excluded was the eldest at the time of vesting as well as at the time of distribution. See *Domvile v. Winnington*, 26 Ch. D. 382.

In the same way an eldest son to be excluded will be ascertained at the time of vesting and not at the time of distribution. *Sandeman v. Mackenzie*, 1 J. & H. 613; *Adams v. Bush*, 8 Sc. 405; 6 Bing. N. C. 164; *Theed's Settlement*, 3 K. & J. 375; *Adams v. Adams*, 25 B. 642; *Domvile v. Winnington*, 26 Ch. D. 382.

The testator may, however, show that the persons filling the character of eldest or youngest children were to be ascertained at the time of distribution by contemplating, for instance, the possibility that several persons successively might become eldest sons after the time of vesting. *Bowles v. Bowles*, 10 Ves. 177; *Livesey v. Livesey*, 2 H. L. 419; *Madden v. Ikin*, 2 Dr. & S. 207. Contrary intention.

Where the gift is to younger children upon some contingency, the cases are conflicting. Gift to a class of younger children upon a contingency.

If there are no children surviving when the contingency happens the gift goes to the representatives of those who died in the lifetime of an elder brother. *Lady Lincoln v. Pelham*, 10 Ves. 166.

If there are children living when the contingency happens, *Ellison v. Airey*, 1 Ves. Sen. 111, and *Hall v. Hewer*, Amb. 204, are direct authorities for saying that the eldest child is to be then ascertained, and not before. See, too, *Stevens v. Pile*, 30 B. 284.

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But now it would probably be held that the class ought to be ascertained at the time when the interests become transmissible, and it was so decided in *Bryan v. Collins*, 16 B. 14. See, too, *Sanders' Trust*, L. R. 1 Eq. 675.

Meaning of  
"entitled."

The exclusion from a class of a child "entitled" to certain property means *primâ facie* entitled in possession. *Chorley v. Loveland*, 33 B. 189; 12 W. R. 187; *Umbers v. Jaggard*, 9 Eq. 201.

See further as to the construction of similar clauses of exclusion, *Wyndham v. Fane*, 11 Ha. 287; *Johnson v. Foulds*, 5 Eq. 268; *Re Gryll's Trust*, 6 Eq. 589; *Shuttleworth v. Murray*, (1900) 1 Ch. 795.

In what cases  
eldest son  
means a son  
taking the  
bulk of the  
estates.

When the testator has placed himself *in loco parentis*, and shows an intention to provide portions for younger children, the rule established with regard to marriage settlements, that elder son means a son taking the bulk of the estate, and younger son a son unprovided for, applies to wills, as well in the case of personalty as of realty. *Bayley's Settlement*, 9 Eq. 491; 6 Ch. 590.

In such cases the rule is that where the bulk of an estate is settled in strict settlement, and by the same settlement portions are provided for younger children, a child taking the bulk of the estate by virtue of the limitations in strict settlement, shall not take any benefit from the portions. *Macoubrey v. Jones*, 2 K. & J. 684, 690.

Even in marriage settlements, however, this construction will not be adopted, unless it appears upon the face of the instrument that the exclusion had reference to the fact of the person to be excluded taking other property. *Re Theed's Settlement*, 3 K. & J. 375; *Hervey-Bathurst v. Stanley*, 4 Ch. D. 251, 262; see *Domvile v. Winnington*, 26 Ch. D. 382.

The time for ascertaining who fills the character of eldest son is the time for distributing the portions, but he need not then be entitled to the settled estate if he has substantially had the benefit of it. *Collingwood v. Stanhope*, L. R. 4 H. L. 43; *Shuttleworth v. Murray*, (1900) 1 Ch. 795; see *In re Fitzgerald's Settled Estates*; *Saunders v. Boyd*, (1891) 3 Ch. 394.

Younger son  
may mean son  
not taking

And a younger son who at that time has become the eldest and takes the estate will be excluded from a portion, though

the portion may have already vested in him. *Gray v. Earl of Limerick*, 2 De G. & S. 370; *Richards v. Richards*, Johns. 754; *Daries v. Huguenin*, 1 H. & M. 730; *Swinburne v. Swinburne*, 17 W. R. 47; see *Leake v. Leake*, 10 Ves. 476. Chap. XXII.  
the family  
estate

If, however, the eldest son is excluded not as eldest son, but by name, the rule does not apply. *Wood v. Wood*, 4 Eq. 48.

And if the testator specifically mentions those whom he includes in the class of younger children, the rule does not apply. *In re Prytherch*; *Prytherch v. Williams*, 42 Ch. D. 590.

There may, however, be circumstances showing that the eldest son is to be ascertained at some other time than the time of distribution; for instance, at the time of vesting.

In what cases  
the eldest son  
is to be  
ascertained  
at the time  
of vesting.

A mere gift over to take effect on a younger son becoming an eldest before attaining twenty-one will not alter the rule. *Bayley's Settlement*, 9 Eq. 491; 6 Ch. 590.

But if there is a clear intention that the portions are to vest indefeasibly before the time of distribution, the eldest son is ascertained at the time of vesting. *Windham v. Graham*, 1 Russ. 331; see *Ex parte Smyth*, 12 Ir. Ch. 487; *Re Rivers' Settlement*, 40 L. J. Ch. 87.

The further question arises in what manner the younger child must be entitled to the estate in order to be excluded from a portion.

Under what  
title a son  
must take the  
family estates  
in order to be  
excluded from  
a portion.

The fact that the estate has been sold for a sum not sufficient to satisfy the portions does not entitle the eldest son to a portion. *Reid v. Hoare*, 26 Ch. D. 363.

A second son, becoming an eldest son, but prevented from taking the estate by a recovery suffered in the lifetime of his brother, is entitled to share in portions provided by the settlement for younger children. *Tennison v. Moore*, 13 Ir. Eq. 424; *Spencer v. Spencer*, 8 Sim. 87; *Macoubrey v. Jones*, 2 K. & J. 684; *Adams v. Beck*, 25 B. 648, overruling *Peacocke v. Pares*, 2 Kee. 689.

So, too, a younger son succeeding to the reversion of the settled estates, not under the settlement creating the portions, but by descent or by devise, is not within the rule, and does not lose his right to a portion. *Sing v. Leslie*, 2 H. & M. 68; *Adams v. Beck*, 25 B. 648.

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An elder son not taking the estate may be entitled to a portion.

On the other hand, as a younger child becoming elder is excluded from taking a portion, so an elder child not taking the estate is admitted to a portion. *Duke v. Doidge*, 2 Ves. Sen. 203.

And if he dies before the time of distribution his representatives are entitled, whether the exclusion is of the eldest son for the time being or not. *Ellison v. Thomas*, 2 Dr. & Sm. 111; 1 D. J. & S. 18; *Davies v. Huguenin*, 1 H. & M. 730; *Swinburne v. Swinburne*, 17 W. R. 47.

Gift to second and other sons has in some cases included a first son.

An elder son has been included under the expression second and other sons, in cases where the probability was that the elder had been left out by mistake. *Langston v. Langston*, 8 Bl. N. S. 16; 2 Cl. & F. 194; *Blake's Estate*, 19 W. R. 765; *Tavernor v. Grindley*, 32 L. T. 424; *Grattan v. Langdale*, 11 L. R. Ir. 473.

But this construction will not be adopted when there are sufficient reasons for the exclusion of the elder son. *Bermingham v. Tuite*, 1 R. 7 Eq. 221; L. R. 7 H. L. 634; *Locke v. Dunlop*, 39 Ch. D. 387.

## CHAPTER XXIII.

## CONSTRUCTION OF GIFTS TO CHILDREN.

## I. ILLEGITIMATE CHILDREN.

A. "THE description child, son, issue, every word of that species, must be taken *primâ facie* to mean legitimate child, son, or issue:" per Lord Eldon, *Wilkinson v. Adam*, 1 V. & B. 422. And it may be stated as a general rule that where there is a bequest to children without anything on the face of the will or in the surrounding circumstances to show that the testator meant by children illegitimate children, and there is a possibility at the date of the will of legitimate children to satisfy the terms of the bequest, evidence *dehors* the will is not admitted to prove that the testator may or must have meant illegitimate children. *Durrant v. Friend*, 5 De G. & S. 343; *Re Davenport's Trusts*, 1 Sm. & G. 126; *Re Overhill's Trusts*, 1 Sm. & G. 362; *Medworth v. Pope*, 27 B. 71; *Warner v. Warner*, 15 Jur. 141; 20 L. J. Ch. 273; and see *Gabb v. Prendergast*, 1 K. & J. 439; *Godfrey v. Davis*, 6 Ves. 43; *Kenebel v. Scrafton*, 2 East, 530; *Harris v. Lloyd*, T. & R. 310; *Mortimer v. West*, 3 Russ. 370; *Bagley v. Mollard*, 1 R. & M. 581; *Sucaine v. Kennerley*, 1 V. & B. 469; *Meredith v. Farr*, 2 Y. & C. C. 525; *Re Bolton*; *Brown v. Bolton*, 31 Ch. D. 542; *In re Fish*; *Ingham v. Rayner*, (1894) 2 Ch. 83.

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Children means legitimate children.

The rule has been applied though the person whose children were to be benefited had, at the date of the will, only illegitimate children, and at the testator's death there was no possibility of any others. *Godfrey v. Davies*, 6 Ves. 43; *Re Davenport's Trusts*, 1 Sm. & G. 126; *Kelly v. Hammond*, 26 B. 36; *Dorin v. Dorin*, L. R. 7 H. L. 568.

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It has also been applied, though the person to whose children a gift was bequeathed had, at the date of the will, only illegitimate children, and was, whether from old age or other causes, never likely to have any others. *Re Overhill's Trusts*, 1 Sm. & G. 362; *Paul v. Children*, 12 Eq. 16; *Re Browne*; *Raggett v. Browne*, 61 L. T. 463; *Re Brown*; *Penrose v. Manning*, 63 L. T. 159; see *Fraser v. Piggott*, You. 354; *Beachcroft v. Beachcroft*, 1 Mad. 430, criticised in *James v. Smith*, 14 Sim. 216; *Re Overhill's Trusts*, 1 Sm. & G. 362; *Holt v. Sindrey*, 7 Eq. 170.

Possibly in such a case the Court would now draw the inference that existing illegitimate children were intended.

Next of kin;  
relations.

The same rule applies where the words next of kin or relations are used. *Re Standley's Estate*, L. R. 2 Eq. 303; as to which case see *In re Deakin*; *Starkey v. Eyres*, (1894) 3 Ch. 565.

In the will of a Jew domiciled in England, children must mean legitimate children according to English and not according to Jewish law. *Lery v. Solomon*, 25 W. R. 842.

Legitimacy  
determined by  
domicile.

The term children in a gift by will of personalty (a), or land devised upon trust for sale (b), or realty (c), to the children of a person domiciled abroad, includes children who are legitimate according to the law of their parents' domicile. *In re Andros*; *Andros v. Andros*, 24 Ch. D. 637 (a); *Skottowe v. Young*, 11 Eq. 474 (b); *In re Grey's Trusts*; *Grey v. Stamford*, (1892) 3 Ch. 88 (c). *In re Wright's Trusts*, 2 K. & J. 595; *Boyes v. Bedale*, 1 H. & M. 798, so far as *contra* are overruled. See, too, *In re Wilson's Trusts*, L. R. 1 Eq. 247; *ib.* 3 H. L. 55; *Atkinson v. Anderson*, 21 Ch. D. 100.

Succession  
*ab intestato*.

As regards succession *ab intestato* a different rule applies to realty and to personalty. A person can only claim as heir by descent who is legitimate by English law. *Doe v. Vardill*, 2 Cl. & F. 571; 7 Cl. & F. 895; 6 Bing. N. C. 385; 9 Bl. N. R. 32. But next of kin of an intestate will include persons who are legitimate by the law of their parents' domicile. *In re Goodman's Trusts*, 14 Ch. D. 619; 17 Ch. D. 266.

In order that a child may be legitimated by the subsequent marriage of its parents, the father must be domiciled, both at



the child's birth and at the marriage, in a country which allows of such legitimation. *In re Grore; Vaucher v. Solicitor to the Treasury*, 40 Ch. D. 216. Chap. XXIII.

B. Under the description of child, son, issue, and similar words, illegitimate children if they have acquired the reputation of being children of the person in question may take in the following cases:—

In what cases illegitimate children may take.

1. If looking at the circumstances existing at the date of the will there is no possibility of legitimate children to satisfy the terms of the bequest.

When there is no possibility of legitimate children.

(a.) If, for instance, the bequest is to the children of A. now living, and A. has only illegitimate children, they would take. *Dorr v. Alexander*, 2 Hare, 282, per Wigram, V.-C.

(b.) So if it appears from the language of the will that children living at the date of the will are meant, and there are only illegitimate children then living, they will take. *In re Haseldine; Grange v. Sturdy*, 81 Ch. D. 511.

Thus in *Holt v. Sindrey*, 7 Eq. 170, there was a bequest to the testator's "daughter Mary, the wife of John Latimer," and after her death "unto all and every the child or children of his said daughter begotten or to be begotten." It appeared that Mary was not the lawful wife of John Latimer, and that the testator was not aware of this fact. Stuart, V.-C. held that illegitimate children born at the date of the will, were sufficiently described by the words "children begotten." See, too, *In re Dixon*, 2 Jur. N. S. 970; *Gabb v. Prendergast*, 1 K. & J. 489.

And in *Savage v. Robertson*, 7 Eq. 176, a bequest to "my sister, Mary Robertson, and her two youngest daughters," Mary Robertson being a spinster, was held a sufficient designation of her two youngest illegitimate daughters. See *Hartley v. Tribber*, 16 B. 510; *Laker v. Hordern*, 1 Ch. D. 644.

A direction, however, to divide property into shares corresponding in number with the number of legitimate and illegitimate children of a person at the date of the will, is not in itself a sufficient indication that illegitimate children then living are meant to be included, since, if before the testator's death one or more of the children had died, the division

Chap. XXIII. prescribed by the will would have been inapplicable. *Cartwright v. Vaudry*, 5 Ves. 580; *In re Wells' Estate*, 6 Eq. 599.

(c.) If the gift is to the children of a deceased person who had only illegitimate children, the illegitimate children take. *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419; *Edmunds v. Fessey*, 29 B. 233.

(d.) If the gift is to the children in the plural of a deceased person who had only one legitimate child and one or more illegitimate children, they will all take in order to satisfy the plural number. *Gill v. Shelley*, 2 R. & M. 336; *Leigh v. Byron* 1 Sm. & G. 486; *In re Humphreys*; *Smith v. Milledge*. 24 Ch. D. 691; but see *Hart v. Durand*, 3 Anstr. 684.

If, however, it does not appear on the face of the will that the person to whose children the bequest is given was dead at the date of the will, and the testator was not a near relation, it will not be presumed that he knew of the death, but evidence will be admitted to show that he was aware of it. See *Herbert's Trusts*, 1 J. & H. 121; *Milne v. Wood*, 42 L. J. Ch. 545.

(e.) The description "children" will also be taken to mean illegitimate children when the gift is to the children of two persons who cannot by any possibility have legitimate children between them. *Bayley v. Snelham*, 1 S. & St. 78.

(f.) The fact that an unmarried man makes a bequest to his children has been held insufficient to include illegitimate children though as a will is revoked by marriage none but illegitimate children could by any possibility take under it. *Pratt v. Mathew*, 22 B. 328; *In re Bolton*; *Brown v. Bolton*, 31 Ch. D. 542; see *Clifton v. Goodbun*, 6 Eq. 278.

Reference to  
existing  
children.

2. If, having regard to the will and surrounding circumstances, the proper inference is that the testator is referring to children living at the date of the will and there are then only illegitimate children. *In re Haseldine*; *Grange v. Sturdy*, 31 Ch. D. 511; *In re Deakin*; *Starkey v. Eyres*, (1894) 3 Ch. 565; see *Re Jeans*; *Upton v. Jeans*, 72 L. T. 835 (step-children).

The testator  
may show  
that he meant

3. Illegitimate children existing at the date of the will, including a child then *en ventre*, may take under the term

children if they are sufficiently indicated, that is to say, where "taking the will as the dictionary of the meaning of the terms used in it," it appears that the testator meant illegitimate children. *Wilkinson v. Adam*, 1 V. & B. 422, p. 462; *Hill v. Crook*, L. R. 6 H. L. 265. "The intention need not be expressed in language which is necessarily susceptible of only one interpretation, but it is sufficient if it is indicated in a way that excludes the probability of an opposite intention having existed in the mind of the testator." *Hill v. Crook*, L. R. 6 H. L. 277, per Lord Chelmsford.

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illegitimate  
children.

(a.) Thus natural children, born at the date of the will, of course take where the gift is to natural children in express terms. *Metham v. Duke of Devon*, 1 P. W. 529; *Barnett v. Tugwell*, 31 B. 292; *Evans v. Massey*, 8 P. 22; *Bentley v. Blizard*, 4 Jur. N. S. 652.

(b.) So if, after a gift to the children of A., the testator in a subsequent gift defines whom he means, by adding "namely," and inserting their names. *Mercedith v. Farr*, 2 Y. & C. C. 525.

(c.) Or if the testator excepts from a gift to the children of A. a child who is illegitimate. *In re Lowe*; *Danily v. Platt*, 61 L. J. Ch. 415; 40 W. R. 475.

(d.) If there is a gift to the children of the testator by a particular woman, when it appears on the face of the will that he has a wife living, or to "my wife A., for life, and after her death to my children," where the testator is not married to A., but has a wife living from whom he is separated, his children by A. will take. *Wilkinson v. Adam*, 1 V. & B. 422; *Lepine v. Bean*, 10 Eq. 160. See *Bayley v. Snelham*, 1 S. & St. 78.

(e.) A convenient rule of construction may be deduced from the judgments of the House of Lords, in *Hill v. Crook*, L. R. 6 H. L. 265, to the effect that where a testator describes A. as the wife of B. when he knows that A. is not in fact lawfully married to B., and by that description gives property to her for life with remainder to her children, the term children must be taken to include A.'s children by B. See per Earl Cairns, L. R. 6 H. L. p. 285.

Gift to A.,  
wife of B.,  
and then to  
her children.

This rule was approved and followed in *In re Horner*; *Eagleton v. Horner*, 37 Ch. D. 695; *In re Harrison*; *Harrison*

Chap. XXIII. *v. Higson*, (1894) 1 Ch. 561; *In re Walker*; *Walker v. Lutjens*, (1897) 2 Ch. 238.

The rule has been held not to apply if there is nothing to show that the testator knew that there was no lawful marriage. *In re Ayles' Trusts*, 1 Ch. D. 282, as explained in *In re Horner*; *Eagleton v. Horner*, 37 Ch. D. 695; *In re Bolton*; *Brown v. Bolton*, 31 Ch. D. 542. See *In re Yearwood's Trusts*, 5 Ch. D. 545; *Ellis v. Houston*, 10 Ch. D. 236.

(f.) Under a gift to the children of the testator's daughter by her present putative husband or by any other person whom she might marry, though the daughter subsequently married her then putative husband, her illegitimate son by him took. *In re Brown's Trust*, 16 Eq. 239; *In re Connor*, 2 J. & Lat. 456; 8 Ir. Eq. 401; *Dilley v. Matthews*, 13 W. R. 676; 11 Jur. N. S. 425.

Illegitimate  
child called  
a child.

(g.) Where a testator has described a person who is illegitimate by a term applicable in strictness to legitimate relationship only, the question often arises whether such a person is included under the same term when used in another part of the will or under another term also applicable in strictness only to legitimate relationship.

The cases run into fine distinctions and depend upon their own peculiar circumstances. The following is a summary of the points which have arisen:—

If the testator applies the expression child to an illegitimate child, that child may take under a general gift to children.

The intention to include the illegitimate child may be shown by a recital that the testator has a certain number of children which can only be satisfied by including an illegitimate child, or by any other evidence of intention to include an illegitimate child in the class children, or by the testator merely applying the term child to the illegitimate child. *Owen v. Bryant*, 2 D. M. & G. 697; *Worts v. Cubitt*, 19 B. 421; *Evans v. Davies*, 7 Ha. 498; *Smith v. Jobson*, 59 L. T. 397; *In re Bryon*; *Drummond v. Leigh*, 30 Ch. D. 110; *In re Jodrell*; *Jodrell v. Seale*, 44 Ch. D. 590; *S. C. sub nom. Seale-Hayne v. Jodrell*, (1891) A. C. 304; *Re Brown*; *Walsh v. Browne*, 62 L. T. 899.

The description in one part of the will of a person who is illegitimate as a child or nephew would no doubt be sufficient to show that he was intended to be included in gifts to children or nephews in another part of the will, unless there is something in the will to lead to a different conclusion. *In re Parker*; *Parker v. Osborne*, (1897) 2 Ch. 208; *Re Walker*; *Walker v. Lutyens*, *ib.* 238.

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Description of illegitimate child as a child.

But where a special provision is made for an illegitimate child, described as a child of a particular person, the illegitimate child has been held not to be included in a subsequent gift to children. In such a case there is an intention to deal with the illegitimate child separately from the others. *Bagley v. Mollard*, 1 R. & M. 581; *Megson v. Hindle*, 15 Ch. D. 198.

Special provision for bastard.

The mere description of an illegitimate child as the testator's nephew has been held insufficient to include him in a subsequent gift to children of his sister. It will be noticed that in this case the word defined by the testator was nephew and not child. *In re Hall*; *Branston v. Weightman*, 35 Ch. D. 551.

(h.) Where a testator devised real estate to an illegitimate daughter, whom he described as his eldest daughter, and the will contained a gift over under certain circumstances of the share, whether land or money, of any of the testator's children, it was held that the gift over applied to the real estate devised to the illegitimate daughter. *Smith v. Jobson*, 59 L. T. 397; see *Allen v. Webster*, 6 Jur. N. S. 574.

Gifts over.

C. It has sometimes been laid down that legitimate and illegitimate children cannot together take under the same description or the same class, see, for instance, Leach, M.R., in *Bagley v. Mollard*, 1 R. & M. p. 586, and Lord Romilly, M.R., in *Pratt v. Mathew*, 22 B. 328. As early an authority, however, as *Wilkinson v. Adam*, 1 V. & B. 422, seems to point the other way (see especially the opinion of the judges there stated), though the exact point was not decided, but there is no doubt now since the case of *Hill v. Crook*, L. R. 6 H. L. 265, that a gift to children, with a clear intention that it shall apply to existing illegitimate children, will be so applied, although the gift must be extended to future legitimate children. See *In re Haseldine*; *Grange v. Sturdy*, 31 Ch. D. 511.

Whether legitimate and illegitimate children can take together under one description.

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Reputed  
children  
already born  
may take  
under gift to  
children of a  
man.

Illegitimate  
child *en ventre*  
at the date of  
the will.

D. A gift to illegitimate children described with reference to their paternity is valid as regards children, who at the date of the will have acquired the reputation of being the children of the father named. *Metham v. Duke of Devon*, 1 P. W. 529; *Wilkinson v. Adam*, 1 V. & B. 422.

E. With regard to an illegitimate child *en ventre sa mère* at the date of the will, such a child can take if it is sufficiently designated; thus a bequest to the child with which a woman is at the time pregnant is a good bequest, as there can be no uncertainty. *Evans v. Massey*, 8 Pr. 22; *Gordon v. Gordon*, 1 Mer. 142; see *In re Shaw*; *Robinson v. Shaw*, (1894) 2 Ch. 573.

And where a gift to the children of a woman applies to illegitimate children, an illegitimate child *en ventre* at the date of the will is admitted to share. *Crook v. Hill*, 3 Ch. D. 773.

Whether  
child *en ventre*  
can acquire a  
title by  
repute.

But if a child is described with reference either to the fact or the reputation of paternity there seems to be considerable doubt whether the bequest is not void for uncertainty. To establish the fact of paternity would involve an inquiry which the law will not allow, and it is doubtful whether an illegitimate child can acquire a title by repute till it is born. See *Earle v. Wilson*, 17 Ves. 528; *In re Bolton*; *Brown v. Bolton*, 31 Ch. D. 542; *In re Shaw*; *Robinson v. Shaw*, (1894) 2 Ch. 573.

In *Gordon v. Gordon* (*sup. cit.*), Lord Eldon says: "A bastard cannot take as the issue of a particular person until it has acquired the reputation of being the child of that person, which cannot be before its birth." (See, too, *Metham v. Duke of Devon*, 1 P. W. 529; *Blodwell v. Edwards*, Cro. El. 549; see 1 Co. Litt. 3b.)

On the other hand, both Lord St. Leonards and Lord Romilly seem to have thought that an illegitimate child *en ventre* may have a name by reputation. "A child *en ventre sa mère* is a child *in esse*, and may have a name by reputation," per Lord St. Leonards in *In re Connor*, 2 J. & Lat. p. 460; 8 Ir. Eq. 401; and "It is undoubtedly true that a child *en ventre sa mère* may acquire a name by reputation although illegitimate," per Lord Romilly in *Pratt v. Mathew*, 22 B. p. 339,

F. There is no rule of public policy, which prevents illegitimate children born after the date of the will and before the testator's death from taking. *Occleston v. Fullalove*, 9 Ch. 147; *In re Hastie's Trusts*, 85 Ch. D. 728, overruling *In re Connor*, 2 J. & Lat. 456; 8 Ir. Eq. 401; *Medworth v. Pope*, 27 B. 73; *Holt v. Sindrey*, 7 Eq. 176; *Howarth v. Mills*, L. R. 2 Eq. 391, so far as they decide the contrary.

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Public policy as to afterborn illegitimate children.

G. When the theory that it was against public policy to allow illegitimate children born in the testator's lifetime but after the date of the will to take was abolished, it might have been expected that, when once the intention to benefit illegitimate children was established, a will would receive the same construction for their benefit as it does in the case of legitimate children.

Afterborn illegitimate children.

The rule of English law in this matter has, however, been to visit the sins of the fathers on the children, and though the severity of the law has been mitigated in some respects the old rule remains in force for many purposes. The law is in fact in a transitional stage, and it is difficult to reconcile all the cases with principle.

The cases go to this :—

Under a gift to illegitimate children of a woman living at the testator's death children born after the date of the will come in. *In re Hastie's Trusts*, 85 Ch. D. 728.

And a gift to the reputed children of a man born or to be born by a particular woman is valid as regards children who have acquired the reputation at the testator's death. *Occleston v. Fullalove*, 9 Ch. 147.

It is not clear whether express words of futurity referring to children born after the date of the will are necessary. See *In re Goodwin's Trust*, 17 Eq. 345.

Born after the date of the will.

If the description refers to the fact and not the reputation of paternity it has been said that illegitimate children born after the date of the will cannot take, as to establish the fact of paternity an inquiry would be necessary which the law does not allow. *In re Bolton*; *Brown v. Bolton*, 81 Ch. D. 542, overruling *In re Goodwin's Trust*, 17 Eq. 345. *In re Bolton*, may, however, be supported on other grounds, and if

Chap. XXIII. a gift to the illegitimate children of a man is valid as regards those who have at the date of the will acquired the reputation of being his children (see *ante*) it is difficult on principle to see why the same construction should not be applied to afterborn illegitimate children.

Illegitimate children born after death.

H. Illegitimate children born after the testator's death and not *en ventre* can in no case take under the will. To admit them would be to encourage immorality. *Crook v. Hill*, 3 Ch. D. 773; *In re Shaw*; *Robinson v. Shaw*, (1894) 2 Ch. 573.

## II. STEP-CHILDREN.

Intention to include step-children.

Step-children may take under the description of children if there is enough in the will and surrounding circumstances to show that they were intended. *Re Jeans*; *Upton v. Jeans*, 72 L. T. 835.

## III. LEGITIMATE CHILDREN.

The term children includes children by a first and second marriage.

1. *Children primâ facie* includes children by a first and second marriage. *Barrington v. Tristram*, 6 Ves. 345; *Critchett v. Taynton*, 1 R. & M. 541; *Andrews v. Andrews*, 15 L. R. Ir. 199.

And even where there was an express reference to a present or any future husband, children by a former husband were not excluded. *Pasmore v. Huggins*, 21 B. 103; *Re Pickup's Will*, 1 J. & H. 389.

But there may be an intention to exclude the children of a first marriage. *Stavers v. Barnard*, 2 Y. & C. C. 539; *Lorejoy v. Carter*, 35 B. 149.

Children do not include grand-children.

2. A gift to the children of a living person will not go to his grandchildren, though he may have only grandchildren living at the date of the will and the testator's death. *Moor v. Raisbeck*, 12 Sim. 123.

If, however, the gift is to the children of a person deceased, who had only grandchildren living at the time, the grandchildren will take, and they will take to the exclusion of



great-grandchildren. *Berry v. Berry*, 3 Giff. 134; 9 W. R. Chap. XXIII. 889; *Fenn v. Death*, 23 B. 73.

But a gift to the children of a deceased person, who has only grandchildren living at the date of the will, will not go to the grandchildren if the will distinguishes between children and grandchildren. *Loring v. Thomas*, 1 Dr. & S. 497.

And a gift to the children of several persons deceased will not include the grandchildren of one who had no children at the date of the will if there are any children of the others to take. *Radcliffe v. Buckley*, 10 Ves. 195; *In re Kirk*; *Nicolson v. Kirk*, 52 L. T. 346; see *In re Smith*; *Lord v. Hayward*, 35 Ch. D. 558.

3. A gift to children hereafter to be born or that may be born will not, without more, exclude children already born. *Hibbithwait v. Cartwright*, Ca. t. Talb. 31; *Wilkinson v. Adam*, 1 V. & B. 422, 464; *Doe v. Hallett*, 1 M. & S. 124; *Harrison v. Harrison*, 1 R. 10 Eq. 290. See *Locke v. Dunlop*, 39 Ch. D. 387.

Gift to children to be born will not exclude those born already.

But where there are gifts to three out of four children living at the date of the will, a gift to each child that may be born applies only to afterborn children. *Early v. Middleton*, 14 B. 453; 3 D. F. & J. 1.

And in the same way a testator may confine his bounty to posthumous children. *Doe d. Blakiston v. Haslewood*, 10 C. B. 544; see *White v. Barber*, 5 Burr. 2703; *Re Lindsay*, 3 Ir. Ch. 239.

Posthumous children.

4. Words *primâ facie* referring to present children, such as "to children lawfully gotten," or "to every child he hath," will not exclude afterborn children if they can fairly be construed as referring to the *stirps*. *Browne v. Groombridge*, 4 Mad. 495; *Ringrose v. Bramham*, 2 Cox, 384; see *Goodfellow v. Goodfellow*, 18 B. 356.

Afterborn children, where excluded.

A gift to "children who survive me" will not exclude those born after the testator's death. *Re Clark's Estate*, 3 D. J. & S. 111.

5. An express gift to one child will not prevent his taking under a subsequent gift to children. *Reay v. Rawlins*, 29 B. 88; see *Hanna v. Bell*, 7 Ir. Ch. 208.

Express gift to a child will not exclude him from a subsequent gift to children.

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Nor will a gift to A. and her daughter for their lives exclude the daughter from taking under a gift in remainder to the children of A. and her daughter. *Almack v. Horn*, 1 H. & M. 680.

On the other hand, a gift to several children by name will not prevent other children from taking under a subsequent gift to children. *Moffat v. Burnie*, 18 B. 211; see *Re Connor*, 2 J. & Lat. 456; 8 Ir. Eq. 401.

A gift to children "from A. downwards" includes A. *Lett v. Osborne*, 47 L. T. 40.

Children of  
parents dead  
at the date of  
the will.

6. When there is a gift to the members of a class for their lives, with remainder to their children, the death of a member of the class in the lifetime of the testator after the date of the will will not prevent his children from taking, but the children of members of the class dead at the date of the will will not take. *Habergham v. Ridehalgh*, 9 Eq. 395.

On the other hand, if the gift is to the testator's brothers and sisters for their lives, with remainder to their children, and the testator has only one brother living at the date of the will, children of deceased brothers and sisters will take. *Barnaby v. Tassell*, 11 Eq. 363.

Gifts to the  
children of  
A. and B.

7. Gifts to the children of A. and B.

a. It seems that the *prima facie* grammatical construction of a gift to the children of A. and B. is that B. and the children of A. are entitled. *In re Featherstone's Trusts*, 22 Ch. D. 111.

b. If A. and B. are described as bearing the same relation to the testator, and equal legacies have been given to them, the children of both take—as in a gift to the children of my brother A. and my brother B. *Mason v. Baker*, 2 K. & J. 567; see *Whicker v. Mitford*, 3 B. P. C. 442.

c. If they do not bear the same relation to the testator, and A. has children at the date of the will, while B. is unmarried, the gift goes to B. and the children of A. *Stummvoll v. Hales*, 34 B. 124.

d. So, too, if A. is described as deceased; for instance, if the gift be to the children of the late A. and B., B. and the children of A. will take. *Lugar v. Harman*, 1 Cox, 250;

*Hawes v. Hawes*, 14 Ch. D. 614; but see *Re Davies' Will*, Chap. XXIII. 29 B. 98.

This is *à fortiori* the case where B. is referred to as a legatee. *Ingle's Trusts*, 11 Eq. 578.

c. A gift for "the benefit of the children of A. and of B." goes to the children of A. and of B. *Peacock v. Stockford*, 3 D. M. & G. 78.

8. If there is a gift to the six children of A. who has only six living at the date of the will, the legacy goes to them. *Sherer v. Bishop*, 4 B. C. C. 55.

Gift to a certain number of children when there are more.

And a seventh child *en ventre* at that time will not be admitted to a share. *Re Emery's Estate*, 24 W. R. 917.

And where the gift was to my four nephews and niece, namely, and there then followed the names of three nephews and a niece, it was held that a fourth nephew could not take. *Glanville v. Glanville*, 33 B. 302.

But if the number does not correspond with the number living at the date of the will, all the children then living will take, whether the gift is of a lump sum or of a distinct sum to each, in which latter case each child will be entitled to a legacy of that sum. *Garrey v. Hibbert*, 19 Ves. 125; *Stebbing v. Walkey*, 2 B. C. C. 85; 1 Cox, 250; *Lee v. Pain*, 4 Ha. 249; *Harrison v. Harrison*, 1 R. & M. 72; *Morrison v. Martin*, 5 Ha. 507; *Yeats v. Yeats*, 16 B. 170; see 4 Ch. D. 46; *Lee v. Lee*, 10 Jur. N. S. 1041; *Spencer v. Ward*, 9 Eq. 507; *In re Bassett's Estate*; *Perkins v. Fladgate*, 14 Eq. 54; *In re Groom*; *Booty v. Groom*, (1897) 2 Ch. 407.

The fact that a blank is left for the insertion of the names of the legatees makes no difference. *M'Kechnie v. Vaughan*, 15 Eq. 289.

In such cases evidence of intention is not admissible to show that the testator meant certain of the children, or the children of a particular marriage who may correspond in number with the number mentioned in the will. *Daniell v. Daniell*, 3 De G. & S. 337; *Matthews v. Foulshaw*, 12 W. R. 1141.

Evidence of intention to benefit certain children.

On the same principle, a gift to the five daughters of A., who has one daughter and five sons, goes to the daughter. *Lord*

**Chap. XXIII.** *Selsey v. Lord Lake*, 1 B. 151. See *Berkeley v. Pulling*, 1 Russ. 496.

But a gift of 100*l.* a-piece to the four sons of A. who had three sons and a daughter, includes the daughter, the intention being to give four legacies. *Lane v. Green*, 4 De G. & S. 239.

Explanatory  
context.

If there is anything to indicate which of the children the testator meant—for instance, an allusion to their residence—the rule does not apply. *Wrightson v. Calvert*, 1 J. & H. 250; see *Hampshire v. Peirce*, 2 Ves. Sen. 216.

So where the gift was to the three children of W., widow of W., and the widow of W. had at the date of the will married again, and there were two children by W. and six by her second husband then living, it was held that the two children by the first marriage were alone intended to take. *Newman v. Piercey*, 4 Ch. D. 41.

It appears never to have been decided whether, when the number of children living at the date of the will is erroneously stated, children born after the date of the will and before the testator's death would be included.

#### IV. DISTRIBUTION PER CAPITA AND PER STIRPES.

Whether a  
gift to the  
children of  
several  
parents is to  
be distributed  
*per stirpes*  
or *per capita*

A gift to A. and the children of B. goes *primâ facie* to all *per capita*, and not *per stirpes*. *Dowding v. Smith*, 3 B. 541; *Rickabe v. Garwood*, 8 B. 579.

So, too, a gift to the children of A. and B., or even to class A., and class B. and C., goes *per capita* to all. *Dugdale v. Dugdale*, 11 B. 402; *Dowding v. Smith*, 3 B. 541; *Pattison v. Pattison*, 19 B. 638; *Armitage v. Williams*, 27 B. 346; *Rook v. A.-G.*, 31 B. 313; *Amson v. Harris*, 19 B. 210; *Tyndale v. Wilkinson*, 23 B. 74; *Baker v. Baker*, 6 Ha. 269; *Fletcher v. Fletcher*, 9 L. R. Ir. 301.

So a gift of two fourth parts to the children of A. and the children of B. goes *per capita*. *Lady Lincoln v. Pelham*, 10 Ves. 166.

Gifts to  
parents and  
their issue.

Similarly a gift to several and their issue, or to the children and grandchildren of A., goes to all children and grandchildren coming into being before the time of distribution *per capita*.

*Barnaby v. Tassell*, 11 Eq. 363; *Lea v. Thorp*, 6 W. R. 480; Chap. XXIII.  
4 Jur. N. S. 447; 27 L. J. Ch. 649.

In the same way a gift after a life interest to surviving children and their issue goes to all the children and issue who survive the time of distribution *per capita*. *Re Fox's Will*, 35 B. 163; 13 W. R. 1013; *Cancellor v. Canceller*, 11 W. R. 16; 2 Dr. & Sm. 199. *Shailer v. Groves*, which, as reported in 6 Hare, 162, might be cited in favour of a different construction, is there wrongly reported, and moreover the order was not drawn up in accordance with the reported judgment. See 11 Jur. 485; 16 L. J. Ch. 367; 2 Jarman Ed. 5, 1548.

The rule applies where the classes are next of kin or families. *Rook v. A.-G.*, 31 B. 313; *Barnes v. Patch*, 8 Ves. 603.

A direction that parents and children are to be classed together, and share in equal proportions, will not import a distribution *per stirpes*. *Turner v. Hudson*, 10 B. 222.

The following indications of intention have been held sufficient to import a distribution *per stirpes*:— Distribution  
*per stirpes*.

a. A gift of one share in certain events to the other legatees *per stirpes*. *Nettleton v. Stephenson*, 18 L. J. Ch. 191.

b. A gift of the share of a child dying, not to the other members of the class, but to the brothers and sisters of the child. *Archer v. Legg*, 31 B. 187; see *Ayscough v. Savage*, 13 W. R. 373.

c. A gift of the income to four persons (including the mother of certain children) till those children attained twenty-one, and then a gift of the principal to three of those persons (not including the mother) and the children equally. *Brett v. Horton*, 4 B. 239.

d. A direction that the share is to be divided in equal shares if more than one of "such respective issue." *Davis v. Bennett*, 4 D. F. & J. 327.

e. If the issue of a *stirps* are treated as taking among them only one equal share, the construction *per stirpes* will be adopted. *Brett v. Horton*, 4 B. 239; *Hunt v. Dorsett*, 5 D. M. & G. 570.

As to the word "devolve," see *Stonor v. Curwen*, 5 Sim. 264.

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A gift to several and their issue "*per stirpes*," or a direction that issue are to take only their parents' share is sufficient to show that the issue were not meant to take in competition with the original takers. *Pearson v. Stephen*, 2 D. & Cl. 328; 5 Bl. N. S. 203; *Johnson v. Cope*, 17 B. 561.

In what cases the distribution will be *per stirpes* throughout.

Whether a direction, that issue are to take only the share their ancestor would have taken, will have the effect of making the distribution a distribution *per stirpes* throughout, seems not to be settled.

The word parent used in a recurring or sliding sense.

Where the direction is that the issue are to take a parent's share, and the word "parent" is used in a recurring or sliding sense, so as to apply to successive generations of issue, it is clear that the distribution will be *per stirpes* throughout. *Ross v. Ross*, 20 B. 645; *In re Orton's Trust*, 3 Eq. 375; *Palmer v. Cruttwell*, 8 Jur. N. S. 479.

So, too, where the direction is that the children or grandchildren are to take an original share between them. *Powell v. Powell*, 28 L. T. 730.

But a mere direction that the share of any of the original takers dying is to go to his issue would, it seems, not have the effect of preventing remoter issue from taking that share with issue less remote *per capita* between them. *Birdsall v. York*, 5 Jur. N. S. 1237; *Southam v. Blake*, 2 W. R. 446; *Weldon v. Hoyland*, 4 D. F. & J. 564. *Robinson v. Sykes*, 23 B. 40, which is *contra*, was on a marriage settlement.

Effect of the words *per stirpes*.

If the gift is to several, and their issues *per stirpes*, the distribution *per stirpes* will be carried through throughout, so that no children or remoter issue can take in competition with the parents. *Dick v. Lacy*, 8 B. 214; *Gibson v. Fisher*, 5 Eq. 51.

Gift to parents for life and then to their children.

When the gift is to several for life, and then to their children, the cases are not easily reconcilable.

1. It seems clear that a gift to A. and B., as tenants in common for their lives, and then at their death, or at or after their deaths, or at the death of A. and B., to their children, goes, upon the death of each tenant for life, to his children. *Flinn v. Jenkins*, 1 Coll. 365; *Tanière v. Pearkes*, 2 S. & St. 388; *Willes v. Douglas*, 10 B. 47; *Arrow v. Mellish*, 1 De G. & S.

355; *Waldron v. Boulter*, 22 B. 284; *Turner v. Whitaker*, Chap. XXIII. 23 B. 196; *Saril v. Saril*, 23 B. 87; *In re Hutchinson's Trusts*, 21 Ch. D. 811; see, too, *Doe d. Patrick v. Royle*, 13 Q. B. 100; *Brown v. Jarvis*, 2 D. F. & J. 168; *Re Rubbins*; *Gill v. Worrall*, 79 L. T. 313.

If the gift is after the deaths of the tenants for life to their children and grandchildren, the families take *per stirpes*, but the children and grandchildren take *per capita inter se*. *Barnaby v. Tassell*, 11 Eq. 363.

But if the testator goes on to explain what he means by "their children," by adding "that is to say, the children of A. and B.," they take *per capita*. *Abrey v. Newman*, 16 B. 431.

2. If the gift be to A. and B. for their lives, and at their death not to their children but to the children of A. and B., there seems less reason for contending that the children are to take *per stirpes*. Gift to A. and B. for life, then to children of A. and B.

However, in *Wells v. Wells*, 20 Eq. 342, the construction *per stirpes* was adopted. See *Milnes v. Aked*, 6 W. R. 490; *Sutcliffe v. Howard*, 38 L. J. Ch. 472; *Re Nott's Trusts*, 20 W. R. 569.

In such a case a superadded direction that, "if there is but one child, the whole is to go to such only child," would afford an argument that the distribution was meant to be *per capita*. *Pearce v. Edmeades*, 3 Y. & C. Ex. 246; 2 W. R. 672; *Swabey v. Goldie*, 1 Ch. D. 380; see, too, *Peacock v. Stockford*, 7 D. M. & G. 129.

3. If the gift to the children is not till after the death of the survivor of the tenants for life, it would seem the distribution will be *per capita*; at any rate if the gift is to the children of A. and B., and not merely to "their children." *Malcolm v. Martin*, 3 B. C. C. 50; *Pearce v. Edmeades*, 3 Y. & C. Ex. 246; *Sterenson v. Gullan*, 18 B. 590; *Nockolds v. Locke*, 3 K. & J. 6; *Swabey v. Goldie*, 1 Ch. D. 380; see *Alt v. Gregory*, 8 D. M. & G. 221. Perhaps *Smith v. Streatfield*, 1 Mer. 358, comes under this head. Gift to children after death of surviving tenant for life.

The fact that upon the death of each life tenant his share of income is given to his children does not import a distribution

Chap. XXIII. of the capital *per stirpes*. *In re Stone*; *Baker v. Stone*, (1895) 2 Ch. 196.

But the children will take *per stirpes* if there is any reference to classes of children, such as a gift to the children of each of the tenants for life. *In re Campbell's Trusts*, 31 Ch. D. 685; 33 Ch. D. 98.

Substitutional  
gifts.

If the gift is substitutional, as to several or their children, the children take *per stirpes*. *Congreve v. Palmer*, 16 B. 435; *Timins v. Stackhouse*, 27 B. 434; *Gowling v. Thompson*, 19 L. T. 242; 11 Eq. 366, n.; *In re Sibley's Trusts*, 5 Ch. D. 494; *In re Battersby's Trusts*, (1896) 1 Ir. 600.

A simple gift, however, to several or their issue, though it would import a distribution *per stirpes* among the families, would not prevent all the issue of each family from taking *per capita inter se*. *Gowling v. Thompson*, 19 L. T. 242; *In re Sibley's Trusts*, 5 Ch. D. 494.

How the  
*stirpes*  
ascertained.

Under a gift to cousins then living and the issue of those then dead, according to the stocks, where the cousins were referred to as the children of the testator's late aunts and uncles, it was held that the cousins and not the aunts and uncles were to be taken as the stocks. *In re Wilson*; *Parker v. Winder*, 24 Ch. D. 664.

Where the gift is to the descendants of A. and B. *per stirpes*, Lord Westbury held that there should be as many shares as there are families in existence at the testator's death, each family taking a share. *Robinson v. Shepherd*, 10 Jur. N. S. 53; 12 W. R. 284; 4 D. J. & S. 129.

On the other hand, Lord Romilly held that A. and B. were the original *stirpes*, and that this mode of division was to be carried out throughout. *Gibson v. Fisher*, 5 Eq. 51.



## CHAPTER XXIV.

## RULES FOR ASCERTAINING CLASS.

## I. AS REGARDS PERSONALTY.

FOR the purpose of ascertaining the class to take under a gift of a fund the Court has adopted certain rules of convenience, the principle being that the class is to be ascertained as soon as possible in order that the beneficiaries may know what their shares are and that the executor may distribute the fund.

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Rule as to  
fund of  
personalty.

These rules apply not only to wills but also to voluntary settlements, and probably also to settlements for value. *In re Knapp's Settlement*; *Knapp v. Vassall*, (1895) 1 Ch. 91.

The rules are as follows:—

1. Under a direct gift to a class without any provisions as to time of vesting, if any members of the class are born at the testator's death they may take to the exclusion of afterborn members. *Hill v. Chapman*, 1 Ves. Jun. 405; 3 B. C. C. 391; *Viner v. Francis*, 2 Cox, 190; *Davidson v. Dallas*, 14 Ves. 576. Direct gifts.

The class will not be enlarged by a gift over on death of any or all of the class under twenty-one, ~~nor~~ by a gift over in default of children. *Davidson v. Dallas*, 14 Ves. 576; *Scott v. Harwood*, 5 Mad. 332; *Berkeley v. Swinburne*, 16 Sim. 275; *Andrews v. Partington*, 3 B. C. C. 401; see *Hutcheson v. Jones*, 2 Mad. 124. Effect of gift over.

If there are no children at the testator's death all the children whenever born are entitled. *Weld v. Bradbury*, 2 Vern. 705; *Shepherd v. Ingram*, Amb. 448; *Hutcheson v. Jones*, 2 Mad. 124; *Harris v. Lloyd*, T. & R. 310. No children at death.

2. In the case of a gift in remainder or after a trust to Future gifts.

**Chap. XXIV.** accumulate, all children born at the death of the testator and coming into *esse* before the death of the tenant for life or the end of the period of accumulation, take a share to the exclusion of those born afterwards. *Middleton v. Messenger*, 5 Ves. 196; *Odell v. Crone*, 3 Dow, 61; *Holland v. Wood*, 11 Eq. 91; *Barnaby v. Tassell*, 11 Eq. 363; *Watson v. Young*, 28 Ch. D. 436.

If the life interest is determinable on bankruptcy or some other event, the class is fixed at the time of determination, unless there is something in the context to enlarge the class, such as postponement of payment till the death of the tenant for life or a declaration that the fund is to go as if the tenant for life were dead. *Re Smith*, 2 J. & H. 594; *Aylwin's Trusts*, 16 Eq. 585; *Brandon v. Aston*, 2 Y. & C. C. 24, 30; *In re Bedson's Trusts*, 25 Ch. D. 458; 28 Ch. D. 523.

If no children are born before the death of the tenant for life all afterborn children are admitted. *Chapman v. Blissett*, Ca. t. Talb. 145; *Wyndham v. Wyndham*, 3 B. C. C. 58.

But this rule does not apply, if there is a clear intention, that distribution is to be made once for all when the fund falls into possession. *Godfrey v. Davis*, 6 Ves. 43; explained in *Conduitt v. Soane*, 4 Jur. N. S. 502.

Imperfect  
limitations.

3. In cases where the limitations are imperfect, for instance, where there is a gift to A. during life or widowhood, with a gift over on her death, and A. marries again, the class to take under the gift over will be ascertained when the prior limitation is out of the way—in the case put, on A.'s remarriage, although the interest of members may be expressed to be contingent upon surviving the tenant for life. *Bainbridge v. Cream*, 16 B. 25; *Stanford v. Stanford*, 34 Ch. D. 362; *In re Tucker*; *Bowchier v. Gordon*, 56 L. J. Ch. 449; 56 L. T. 118; 35 W. R. 344; *In re Dear*; *Helby v. Dear*, 58 L. J. Ch. 659; 61 L. T. 432; 38 W. R. 31.

Gift of  
reversionary  
property.

4. On the same principle, if the interest bequeathed is reversionary, the class remains open till the interest falls into possession. *Walker v. Shore*, 15 Ves. 122; *Harvey v. Stracey*, 1 Dr. 122.

But this does not apply where a residue is given and some

portion of the property which falls into it is reversionary, unless there are provisions indicating an intention to treat the reversionary property separately. *Hill v. Chapman*, 1 Ves. Jun. 405; 3 B. C. C. 391; *Hagger v. Payne*, 23 B. 474; *Coventry v. Coventry*, 2 Dr. & Sm. 470; *King v. Cullen*, 2 De G. & S. 252. Chap. XXIV.

5. If there is a direct gift "to be paid at twenty-one, or to such as attain twenty-one:" Gift to be paid at twenty-one.

a. If any member of the class has attained twenty-one at the testator's death the class is fixed at the death. *Hagger v. Payne*, 23 B. 474.

b. If none attain twenty-one in the testator's lifetime, all born at the testator's death and coming into existence before the eldest attains twenty-one are admitted. *Andrews v. Partington*, 3 B. C. C. 401; *Hoste v. Pratt*, 3 Ves. 729; *Balm v. Balm*, 3 Sim. 492; *Blease v. Burgh*, 2 B. 221; *Oppenheim v. Henry*, 10 Ha. 441; *Gillman v. Daunt*, 3 K. & J. 48; *Locke v. Lamb*, 4 Eq. 372; *Gimblett v. Purton*, 12 Eq. 427; *In re Knapp's Settlement*; *Knapp v. Vassall*, (1895) 1 Ch. 91.

As a rule each child attaining twenty-one is entitled to have his share paid to him, but this is not so if the whole income is given for maintenance and there are children who require maintenance. *Berry v. Briant*, 2 Dr. & Sm. 1.

c. It seems doubtful whether, if there are no children at the testator's death, all would be admitted whether born before or after the eldest attains twenty-one. *Armitage v. Williams*, 27 B. 346, better reported in 7 W. R. 650, which seems an authority for the affirmative, was probably decided on the authority of *Mainwaring v. Beevor*, *post*; see *Harris v. Lloyd*, T. & R. 810.

There are the following exceptions to the rule:—

a. Where after a life interest there was a gift to the grandchildren of the testator's brother followed by a direction that it was to be received by them when they should severally attain twenty-five years of age, it was held that only grandchildren living at the death of the tenant for life were entitled. The gift would have been void for perpetuity if, according to the ordinary rule, the class had been ascertained when the

Exceptions to the general rule.

*Kevern v. Williams*;  
*Elliott v. Elliott*.

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eldest grandchild attained twenty-five. *Kerern v. Williams*, 5 Sim. 171; see, too, *Elliott v. Elliott*, 12 Sim. 276. No reasons are given for the decision in *Kerern v. Williams*. Both cases are unsatisfactory. *Elliott v. Elliott* has, however, been followed in *In re Coppard*; *Howlett v. Hodson*, 35 Ch. D. 350; but see *In re Wenmoth's Estate*; *Wenmoth v. Wenmoth*, 37 Ch. D. 266, p. 270; *In re Mervin*; *Mervin v. Crossman*, (1891) 3 Ch. 197.

Maintenance out of vested and presumptive shares.

b. Maintenance out of the shares or presumptive shares of children will not extend the class. *Gimblett v. Purton*, 12 Eq. 427.

But if maintenance and advancement are continued beyond the time when the eldest child attains twenty-one, if, for instance, advancement is directed out of vested and presumptive shares, all children will be let in. *Iredell v. Iredell*, 25 B. 485; *Bateman v. Gray*, 6 Eq. 215.

In *Deffis v. Goldschmidt*, 19 Ves. 566; 1 Mer. 417, where expressions were used showing that the parent could not die leaving a child who would not be entitled to maintenance, all children were included. See *Evans v. Harris*, 5 B. 45.

Distribution when the youngest attains twenty-one.

c. If distribution is to be made when all attain twenty-one, or when the youngest attains twenty-one, all children will be admitted. *Hughes v. Hughes*, 3 B. C. C. 434; 14 Ves. 256; *Mainwaring v. Beavor*, 8 Ha. 44; *Pilkington v. Pilkington*, 29 L. R. Ir. 370; and perhaps *Armitage v. Williams*, 27 B. 346; 7 W. R. 650.

On the other hand, the class would again be restricted if the distribution is to be made when the youngest for the time being attains twenty-one. *Gooch v. Gooch*, 14 B. 565; 3 D. M. & G. 366.

Gift of fixed sum to each member of a class.

d. When the gift is of a particular sum to each member of the class, the class is fixed at the death of the testator, whether possession is postponed to twenty-one or not. *Ringrose v. Bramham*, 2 Cox, 384; *Storrs v. Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Butler v. Lowe*, 10 Sim. 317.

And if there are no children then in existence, the gift fails. *Mann v. Thompson*, Kay, 638; *Rogers v. Mutch*, 10 Ch. D. 25.

6. If the gift is to A. for life, then to children who attain twenty-one, the class will be fixed as regards exclusion at the death of A., or when the eldest attains twenty-one, whichever is last. *Clarke v. Clarke*, 8 Sim. 59; *Robley v. Ridings*, 11 Jur. 813; *Beckton v. Barton*, 27 B. 99; 5 Jur. N. S. 349; *In re Emmet's Estate*; *Emmet v. Emmet*, 13 Ch. D. 484; *In re Knapp's Settlement*, (1895) 1 Ch. 91.

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Gift to children who attain twenty-one after life interest.

7. A child *en ventre* at the time when the class closes is admitted to share, even though the word "living" or "born" be added to the description. *Doe v. Clarke*, 2 H. Bl. 399; *Clarke v. Blake*, 2 B. C. C. 319; *Trower v. Butts*, 1 S. & St. 181; *Bortoft v. Wadsworth*, 12 W. R. 523; *In re Burrows*; *Cleghorn v. Burrows*, (1895) 2 Ch. 497.

Children *en ventre* when the class closes are admitted.

*In re Gardiner*; *Garratt v. Weeks*, 20 Eq. 647, is not consistent with the other authorities.

Similarly, when there is a gift to the children of a tenant for life, a gift over, if at the end of five years she has not had a child, will not take effect if she then has a child *en ventre*. *Pearce v. Carrington*, 8 Ch. 69.

A child *en ventre* is for this purpose supposed to be born at the time of distribution; if, therefore, supposing it to have been then born, it would have been illegitimate, it will not be admitted to take, notwithstanding the marriage of its parents before its birth. *In re Corlass*, 1 Ch. D. 460.

Case of child conceived before but born after marriage.

Possibly a child *en ventre* would not be included if the language used is "born and living." *Blasson v. Blasson*, 2 D. J. & S. 665.

## II. AS REGARDS GIFTS OF INCOME.

Even as regards personalty the rules already stated do not apply when the reason for their application does not exist. Thus, under a gift of income among a class of children during their lives to be paid on their attaining twenty-one years, the class is not ascertained when the first attains twenty-one, but a child born after that time will be admitted. *In re Wenmoth's Estate*; *Wenmoth v. Wenmoth*, 37 Ch. D. 266; see *In re Powell*; *Crosland v. Holliday*, (1898) 1 Ch. 227.

Gifts of income.

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## III. AS REGARDS REAL ESTATE.

Rules as to  
realty.

The principle upon which the rules applicable to personalty for ascertaining the class of takers rest, namely, an early distribution of the estate, does not apply to real estate.

Immediate  
devise.

1. As to the effect of a direct devise to the children of A. the cases are not satisfactory.

There is authority for saying that if there are children living at the testator's death those children alone take, to the exclusion of afterborn children.

This position may be supported either on the ground that, as a matter of construction, a devise to the children of A. means children living at the testator's death, or on the ground that such a devise is subject to the old rule that "no limitation which is capable of taking effect at the common law shall be construed to take effect as an executory limitation" (Challis' Real Property, p. 96).

If, therefore, there are children living at the testator's death, the limitation can take effect at common law, and those children only take.

If the former ground is the correct one, afterborn children cannot take even if there are no children living at the testator's death. If the latter is correct, then, if there are no children living at the testator's death, the devise can only take effect as an executory devise, and all afterborn children will come in.

The former view is supported by *Singleton v. Gilbert*, 1 Cox, 68; *S. C.* sub nom. *Singleton v. Singleton*, 1 B. C. C. 541, n.; *Scott v. Harwood*, 5 Mad. 332; *In re Powell*; *Crosland v. Holliday*, (1898) 1 Ch. 227, the latter by *Wild's Case*, 6 Rep. 16b; *Shepherd v. Ingram*, Amb. 448; the observations of Downes, C.J. in *Crone v. Odell*, 1 Ba. & Be. 449, p. 458. See, too, the arguments in *Mogg v. Mogg*, 1 Mer. 654, 676, 682; *Weld v. Bradbury*, 2 Vern. 705; Fearn, Cont. Rem. 532; *Shepherd's Touchstone* by Preston, 436. In *Cook v. Cook*, 2 Vern. 545, children living at the testator's death and afterborn children were admitted to take. But the case is very shortly reported.

The objection to the former view is that it puts a different meaning upon the same words as applied to real and personal estate. Chap. XXIV.

In accordance with the latter view it has been held that if there are no children living at the testator's death all children born after his death will be admitted. In such a case the devise must take effect as an executory devise. *Shepherd v. Ingram*, Amb. 448 (a residue of real and personal estate).

If the devise is to children begotten and to be begotten, the devise must also be construed as executory, so as to let in all the children whether born before or after the testator's death. *Mogg v. Mogg*, 1 Mer. 654; *Eddowes v. Eddowes*, 30 B. 603; see *Gooch v. Gooch*, 14 B. 565; 3 D. M. & G. 366; *O'Hea v. Slattery*, (1895) 1 Ir. 7. Children born and to be born.

If the devise is to trustees upon trust for the children of A. in such a way as to give the children equitable estates, it would seem on principle that unless, upon the proper construction of the will, children means only children living at the testator's death, all children ought to be admitted, but there appears to be no authority in point. Devise of equitable estates.

2. A devise of the legal estate to A. for life with remainder to a class of children is governed, in the case of wills not executed, revived or republished after the 2nd of August, 1877 (40 & 41 Vict. c. 33), by the rules of law applicable to contingent remainders; that is to say, only those children can take whose interests become vested before the determination of the life interest. If there are none at that time whose interests have become vested the devise in remainder fails. *Rhodes v. Whitehead*, 2 Dr. & Sm. 532; *Price v. Hall*, 5 Eq. 399; *Percival v. Percival*, 9 Eq. 386; *Brackenbury v. Gibbons*, 2 Ch. D. 417; *Cunliffe v. Brancker*, 3 Ch. D. 393. Contingent remainder.

An ordinary devise to a tenant for life with remainder to his children who attain twenty-one comes within this rule and goes to those children only who have attained twenty-one at the death of the tenant for life.

By the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), it is enacted:— Contingent Remainders Act.

“ Every contingent remainder, created by any instrument

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executed after the passing of this Act (2nd August, 1877), or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other limitation."

A doubt has been suggested whether the Act applies where the remainder has become vested in one member of a class, as in such a case it cannot be said that the particular estate has determined "before the contingent remainder vests" (Williams on Seisin, pp. 205—208).

There is at present no authority as to the effect of the Act upon the question of ascertaining the class to take.

Who are  
included  
under execu-  
tory devise.

3. A devise after a life interest to a class, if the devise to the class is to be construed as an executory devise, includes all members of the class who satisfy the description whenever they may be born. *Blackman v. Fysh*, (1892) 3 Ch. 209.

## IV. CLASS TO TAKE IN DEFAULT OF APPOINTMENT.

At what time  
the class to  
take in  
default of  
appointment  
is to be fixed.

When there is a gift to children, as A. may appoint, with no gift in default of appointment, and no appointment is made, similar rules apply as to the period at which the class is to be ascertained.

1. A direct gift to children, as A. may appoint, goes apparently to all the children living at the death of the testator, to the exclusion of those born afterwards, though before the death of A. *Coleman v. Seymour*, 1 Ves. Sen. 209.

2. A gift to A. for life, with remainder to his children as he shall appoint, goes to all the children born in the testator's lifetime and coming into being before A.'s death. *Crone v. Odell*, 1 Bu. & Be. 449; 3 Dow, 68; *Norman v. Norman*,



Bea. 490; *Pattison v. Pattison*, 19 B. 688; *Lambert v. Thwaites*, Chap. XXIV. L. R. 2 Eq. 151.

3. If the only gift is through the power, so that the children take by implication only, in default of appointment, the rules are the same. Case when the only gift is through the power.

Thus, where there is a power to A. to dispose of certain property among children, the gift, in default of appointment, goes to those born at the testator's death, to the exclusion of those born subsequently. *Longmore v. Broom*, 7 Ves. 124.

And where the gift is to A. for life, and then to dispose of the capital among his children, all children born before A.'s death take a share. *Grievson v. Kirsopp*, 2 Kee. 653.

4. If the donee of the power and the tenant for life are different persons, and the donee dies before the tenant for life, the class is ascertained at the death of the latter. *White's Trusts*, Johns. 656.

And, apparently, if there is anything to show that personal enjoyment by the beneficiaries was intended, those dying before the tenant for life would be excluded. *White's Trusts*, *supra*; *Carthew v. Enraght*, 20 W. R. 743; *In re Phene's Trusts*, 5 Eq. 346.

At what time the class would be ascertained if the donee of the power survives the tenant for life is uncertain; though by analogy to the case of a direct gift it seems it would be ascertained at the death of the tenant for life, and not of the donee of the power.

5. When there is a direct vested gift to children as A. shall appoint, the fact that the power is to appoint by deed or will, or by will only, will not affect the class to take in default of appointment. *Casterton v. Sutherland*, 9 Ves. 445; *Falkner v. Lord Wynford*, 15 L. J. Ch. 8; *Lambert v. Thwaites*, L. R. 2 Eq. 151, see *Winn v. Fenwick*, 11 B. 438, there discussed. Power to appoint by deed or will.

6. If the only gift is through the power, and a gift can be implied in favour of the objects of the power, only those will take by implication in default of appointment who could have taken under the power; and, therefore, if the power is testamentary, only those who survive the donee can take in default of appointment. *Cruwys v. Colman*, 9 Ves. 319;

Chap. XXIV. *Walsh v. Wallinger*, 2 R. & M. 78; *Kennedy v. Kingston*, 2 J. & W. 481; *Reid v. Reid*, 25 B. 469; *Freeland v. Pearson*, 3 Eq. 658; *In re Susanni's Trusts*, 47 L. J. Ch. 65; *Sinnott v. Walsh*, 5 L. R. Ir. 27; *Moore v. Ffolliot*, 19 L. R. Ir. 499; see *Brown v. Pocock*, 6 Sim. 257, where it does not appear from the report whether the wife survived her husband or not; see L. R. 2 Eq. 157.

And if at the death of A. a power is given to B. to divide the property among the testator's children, and all the children die in A.'s lifetime, before the power became exercisable, no gift to the children can be implied. *Halfhead v. Shepherd*, 28 L. J. Q. B. 249.

7. On the other hand, if the gift is to such children of A. as he shall by any writing appoint, all his children, whether or not they survive prior tenants for life or their own parent, are entitled to share. *Wilson v. Duguid*, 24 Ch. D. 244.

#### V. EFFECT OF WORDS OF FUTURITY.

How far words of futurity affect the ordinary rules for fixing the class to take under a gift to children.

Mere words of futurity as, for instance, a gift to the children that may be born, will not extend the class. *Storrs v. Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Townsend v. Early*, 3 D. F. & J. 1; see *Gibbons v. Gibbons*, 6 App. C. 471.

Where the words are "born or to be born," the rules appear to be:—

Children born or to be born.

1. When the gift is after a life estate, such words will not extend the class. *Sprackling v. Ranier*, 1 Dick. 344; *Whitbread v. St. John*, 10 Ves. 152; *Parsons v. Justice*, 34 B. 598.

In *Scott v. Earl of Scarborough*, 1 B. 154, the class was extended on the ground that the words were "now born or who shall hereafter be born during the lifetime of their respective parents." But these words are only the expression "all the children" writ large. There were, however, expressions in the will sufficient to support the decision.

On the other hand, in *Parsons v. Justice*, 34 B. 598, no effect was given to a direction that no child should be excluded in consequence of any other child attaining a vested interest.

2. The rule is the same where the gift is to children now born or who may be born hereafter who shall attain twenty-one. *Iredell v. Iredell*, 25 B. 485; *Bateman v. Gray*, 29 B. 447; 6 Eq. 215. Chap. XXIV.

3. In the case of a direct gift of personalty to children, the words "now born or to be born hereafter" would probably be held to be intended to refer to children born between the date of the will and the death. *Dias v. De Livera*, 5 App. C. 123.

For the meaning of the words "born in due time" see *In re Wass*; *Marshall v. Mason*, W. N. 1882, 158.

4. If the gift is of a legacy to each of the children begotten or to be begotten, the class will not be extended beyond the testator's death, as not merely the distribution of what the children are to take, but of the whole estate of the testator, would be indefinitely postponed. *Butler v. Lowe*, 10 Sim. 317.

## CHAPTER XXV.

## MEANING OF WORDS DESCRIPTIVE OF RELATIONSHIP.

## I. NEPHEWS AND NIECES.

**Chap. XXV.** NEPHEWS and nieces mean *primâ facie* the children of brothers and sisters, including those of the half-blood. *Falkner v. Butler*, Amb. 514; *Grievies v. Rawley*, 10 Ha. 63; *Cotton v. Scarancke*, 1 Mad. 45: see *Brigg v. Brigg*, 33 W. R. 454; *In re Reed*, 57 L. J. Ch. 790; 86 W. R. 682.

Nephews and nieces mean *primâ facie* children of brothers and sisters.

The meaning of the word will not be enlarged where the gift is to each of the present nieces of A., who had only one niece of the first degree living at the date of the will. *Crook v. Whitley*, 7 D. M. & G. 490.

The fact that the gift is to "nephews, descendants of my brothers," will not enlarge the class. *Williamson v. Moore*, 10 W. R. 536.

The fact that a great-niece or a wife's niece has been previously called a niece will not enlarge the meaning of the word. *Shelley v. Bryer*, Jac. 207; *Thompson v. Robinson*, 27 B. 486; *Smith v. Liddiard*, 3 K. & J. 252; *Wells v. Wells*, 18 Eq. 504; *Merrill v. Morton*, 17 Ch. D. 382.

Nor will a gift to my great-nephew, and such *other* of my nephews and nieces as shall be living at my death. *Blower's Trusts*, 11 Eq. 97; 6 Ch. 351.

In what cases a wife's nephew may take.

But if the testator has at the date of his will and death no nephews and nieces of his own, and there are nephews and nieces of his wife, they will take, though he may have had brothers and sisters living at the date of his will. *Hogg v. Cook*, 32 B. 641; *Sherratt v. Mountfield*, 15 Eq. 305; 8 Ch.

928; see *Adney v. Greatrex*, 17 W. R. 637; *In re Fish*; **Chap. XXV.**  
*Ingham v. Rayner*, (1894) 2 Ch. 83.

The words "nephews and nieces on both sides" include a wife's nephew. *Frogley v. Phillips*, 30 B. 168; 3 D. F. & J. 466.

If a great-nephew is referred to as taking a share of a gift to nephews and nieces, the words will be held to include grand-nephews and grand-nieces. *Weeds v. Bristow*, L. R. 2 Eq. 333.

And if the testator expressly defines a niece, as "my niece, daughter of my nephew," nephews and nieces will include grand-nephews and grand-nieces. *James v. Smith*, 14 Sim. 214.

A bequest to "male nephews" has been held to include only sons of brothers. *Lucas v. Cuddy*, I. R. 10 Eq. 514.

## II. COUSINS.

The word cousins means primarily children of uncles and aunts. *Sanderson v. Bayley*, 4 M. & Cr. 56; *Caldecott v. Harrison*, 9 Sim. 457; *Stoddart v. Nelson*, 6 D. M. & G. 68; *Stevenson v. Abingdon*, 31 B. 305; *Burbey v. Burbey*, 9 Jur. N. S. 96. Cousins.

Second cousins are persons who have the same great grandfather or great-grandmother, and will not therefore include first cousins once removed. *Corporation of Bridgnorth v. Collins*, 15 Sim. 541; *In re Parker*; *Bentham v. Wilson*, 50 L. J. Ch. 639; 15 Ch. D. 528; 17 Ch. D. 262. Second  
cousins.

But if there are no second cousins the term will include all within the same degree of relationship, unless there is an intention to exclude first cousins twice removed, for instance, by a substitutionary gift to the children of second cousins who had died. *Slade v. Fooks*, 9 Sim. 386; *In re Bonner*; *Tucker v. Good*, 19 Ch. D. 201.

In a gift to "first and second cousins," the words will have their strict meaning, unless there is something to show that the testator is not using them in their proper sense. *In re Parker*; *Bentham v. Wilson*, 15 Ch. D. 528, where *Mayott v. Mayott*, 2 B. C. C. 125, is explained, and *Charge v. Goodyer*, First and  
second  
cousins.

**Chap. XXV.** 3 Russ. 140; *Silcox v. Bell*, 1 S. & St. 301, are disapproved; see *Wilks v. Bannister*, 30 Ch. D. 512.

“Cousin” may include the wife of a cousin. *In re Taylor; Cloak v. Hammond*, 34 Ch. D. 255.

### III. GRANDCHILDREN.

Grand-  
children.

Similarly, grandchildren, unless explained by the context, will not include great-grandchildren. *Oxford v. Churchill*, 3 V. & B. 59.

But if the gift is to grandchildren herein named, a great-grandchild who has previously been called grandchild may take. *Hussey v. Berkeley*, 2 Ed. 194.

### IV. ISSUE.

Issue.

A bequest to issue as purchasers goes to all issue, children, grandchildren, &c., as joint tenants, and all come in who are in existence at the time of vesting in possession. *Davenport v. Hanbury*, 3 Ves. 257; *Freeman v. Parsley*, 3 Ves. 421; *Maddock v. Legg*, 25 B. 581; *Weldon v. Hoyland*, 4 D. F. & J. 564; *Hobgen v. Neale*, 11 Eq. 48.

And in the case of a devise of realty, all such issue take as joint tenants for life, or in fee, according as the will dates before or since the Wills Act. *Cook v. Cook*, 2 Vern. 545; *Mogg v. Mogg*, 1 Mer. 654, 689; *Dalzell v. Welch*, 2 Sim. 319.

Exceptions.

1. In the case of realty, however, this construction will be excluded if there is a general intention manifest to keep the estates together in a single line of enjoyment, in which case the estates will devolve according to the rule in *Mandeville's Case*. *Allgood v. Blake*, L. R. 7 Ex. 339; *ib.* 8 Ex. 160; and see *Whitelock v. Heddon*, 1 B. & P. 248.

In what cases  
issue means  
children.

2. The generality of the word issue will be restrained if the testator explains that he meant by issue children.

a. This will be the case if the word issue is coupled with father or mother or parent: for instance, if, in a substitutional gift to issue, the issue are directed to take their parent's share. *Sibley v. Perry*, 7 Ves. 522; *Pruen v. Osborne*, 11 Sim. 132;

*Smith v. Horsfall*, 25 B. 628; *Stevenson v. Abingdon*, 31 B. 305; *Macgregor v. Macgregor*, 1 D. F. & J. 68; *Martin v. Holgate*, L. R. 1 H. L. 175; *Bryden v. Willett*, 7 Eq. 472; *Heasman v. Pearse*, 7 Ch. 275; *In re Judd's Trusts*, W. N. 1884, 206; see, however, *Ralph v. Carrick*, 11 Ch. D. 873.

This rule applies to a deed. *Barraclough v. Shillito*, 32 W. R. 875.

If, however, the word parent is not used in the sense of the first taker, whose share the issue are to take by substitution, but in what might be called a sliding sense, so as to denote child, grandchild, great-grandchild, and so on, it will not have the effect of cutting down issue to children. See *Ross v. Ross*, 20 B. 645, where the testator distinguished between a parent's share and a child's share, children being the first takers.

The fact that there is a gift over in default of issue of the first takers affords an argument against construing issue as equivalent to children, though it is not in itself conclusive. See cases *supra cit.*; *Re Kavanagh's Will*, 13 Ir. Ch. 120; *Corrie's Will*, 32 B. 426.

But if the gift over is not merely in default of issue but in default of "children or issue," it would seem that the word issue cannot be restricted, though the issue are directed to take only a parent's share. *Ross v. Ross*, 20 B. 645; *Ralph v. Carrick*, 11 Ch. D. 873, 888.

b. Issue of issue must mean issue of children, if not children of children. *Pope v. Pope*, 14 B. 593; *Williams v. Teale*, 6 Ha. 239; *Heasman v. Pearse*, 7 Ch. 275; *Livesay v. Walpole*, 23 W. R. 825.

So, too, children of issue will mean children of children. *Fairfield v. Bushell*, 32 B. 158.

c. In a marriage settlement or in a settlement by will made on marriage of a legatee, limitations in favour of the "issue of the marriage" would probably be confined to children. *In re Dixon's Trusts*, I. R. 4 Eq. 1; *In re Denis's Trusts*, I. R. 10 Eq. 81; *In re Biron*, 1 L. R. Ir. 258; *Harris v. Loftus*, (1899) 1 Ir. 491; see *Donoghue v. Brooke*, I. R. 9 Eq. 489.

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Effect of a gift over in default of issue.

Gift over in default of children or issue.

Issue of issue.

Issue of the marriage in a settlement.

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As to the meaning of legal issue by marriage in a will, see *Reed v. Braithwaite*, 11 Eq. 514.

Issue lawfully begotten.

The words issue lawfully begotten of a person will not confine issue to children. *Hayden v. Willshire*, 3 T. R. 372; *Evans v. Jones*, 2 Coll. 516.

d. If after a gift to issue the testator adds, "and if but one then to such only child," issue will mean children. *Goldie v. Greaves*, 14 Sim. 348; *Carter v. Bentall*, 2 B. 551; *Bryden v. Willett*, 7 Eq. 472; *In re Hopkins' Trusts*, 9 Ch. D. 131; *In re Biron*, 1 L. R. Ir. 258; see *In re Meade's Trusts*, 7 L. R. Ir. 51.

Effect of gift over.

e. In a gift to the issue of a tenant for life and their heirs, followed by a gift over if the tenant for life dies without children, issue means children. *Morgan v. Thomas*, 9 Q. B. D. 643.

Explanatory reference.

f. The testator may explain what he meant by issue, for instance, by adding after a gift to issue the words "child or children" or "whether sons or daughters" (a); or by referring to a gift in favour of issue as being a gift in favour of children (b). *Horsepool v. Watson*, 3 Ves. 383; *Farrant v. Nichols*, 9 B. 327 (a); *Macgregor v. Macgregor*, 1 D. F. & J. 63; *Baker v. Bayldon*, 31 B. 209 (b).

No rule that if issue once means children it always means children.

g. It has been said by Lord St. Leonards, referring to the meaning of the word issue, "It is a well settled rule of construction and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word where it occurs twice or oftener in the same settlement unless there appear a clear intention to the contrary." *Ridgeway v. Munkittrick*, 1 Dr. & War. 84, 93; see *Roche v. Roche*, 2 J. & Lat. 561, 568.

The so-called rule is perhaps incautiously expressed. It cannot mean that if issue is once used in a context which shows that it means children, it must always have that meaning where there is no such context. Looking at the case in which the rule was laid down, the true meaning of the rule probably is that if upon the whole will the Court comes to the conclusion that the testator uses the word issue as equivalent to children, it must have that meaning wherever it occurs. *Edwards v. Edwards*, 12 B. 97; *Rhodes v. Rhodes*, 27 B. 413;



*Foster v. Wybrants*, 1 R. 11 Eq. 40; *In re Harrison's Estate*, Chap. XXV. 3 L. R. Ir. 114; *In re Birks*; *Kenyon v. Birks*, (1899) 1 Ch. 708; rev. (1900) 1 Ch. 417.

The fact that the testator uses the words issue and children interchangeably is strong evidence that by issue he means children. Cases *supra*; *Benn v. Dixon*, 16 Sim. 21.

Issue and children used interchangeably.

But the fact that in giving a power of appointment to a daughter the words issue and children are used synonymously, while in giving a power to a son over other property the word issue only is used (*a*); that in one place issue is used in a gift over upon death under twenty-one without issue of certain infants, where it must mean children (*b*); that there is a gift to the issue and another gift to the children of the same tenant for life (*c*); that half the estate is given after the death of the tenant for life to her issue, which is explained to mean children, and the other half is given over on her death without issue, nothing being given to the issue (*d*); that a power to appoint to issue is followed by a gift in default of appointment to issue which is interpreted to mean children (*e*), is not sufficient to show that issue is always used as equivalent to children. *Dalzell v. Welch*, 2 Sim. 319 (*a*); *Head v. Randall*, 2 Y. & C. C. 231 (*b*); *Waldron v. Boulter*, 22 B. 284; *Hedges v. Harpur*, 9 B. 479; 8 De G. & J. 129; *Re Corrie's Will*, 32 B. 427 (*c*); *Carter v. Bentall*, 2 B. 551; see *Caulfield v. Maguire*, 2 J. & Lat. 176 (*d*); *In re Warren's Trusts*, 26 Ch. D. 208 (*e*); see *Williams v. Treale*, 6 Ha. 239.

When issue will not mean children.

When the gift to issue is substitutional, the class of issue is not to be ascertained once for all at the death of the parent, but it will include persons subsequently born before the period of distribution. *In re Sibley's Trusts*, 5 Ch. D. 494; *In re Jones's Estate*; *Hume v. Lloyd*, 47 L. J. Ch. 775; overruling *Hobgen v. Neale*, 11 Eq. 48.

At what time the class of issue is to be ascertained in a substitutional gift.

In the case of a gift in remainder to issue the same rule applies; that is to say, all the issue born at the testator's death and coming into being before the death of the tenant for life are admitted. *Surridge v. Clarkson*, 14 W. R. 979.

If the gift is to several for life, and then to their issue, with cross-remainders between them, the class of issue to take

In the case of cross-remainders.

Chap. XXV. under the cross-remainders is fixed once for all at the death of the parent, who is tenant for life, and not at the death of the tenant for life dying without issue. *In re Ridge's Trusts*, 7 Ch. 665.

#### V. DESCENDANTS.

**Descendants.** Descendants means *primâ facie* all descendants living at the time of distribution, and apparently they take *per capita*. *Crossley v. Clare*, Amb. 397; 3 Sw. 320; *Butler v. Stratton*, 3 B. C. C. 367; *Re Flower*; *Matheson v. Goodwyn*, 62 L. T. 216; 63 L. T. 201.

But the expression "descendants or representatives" imports a distribution *per stirpes*. *Rowland v. Gorsuch*, 2 Cox, 187.

The word descendants requires a stronger explanatory context to confine it to children than the word issue. For instance, a direction that descendants are to take a parent's share would not limit the class to children. *Ralph v. Carrick*, 11 Ch. D. 873.

It would seem that the term descendants, when used as a word of purchase, and coupled with a gift to the ancestor, has a substitutional and representative sense, so that in a gift to several and their descendants, descendants would not take in competition with their ancestor. *Tucker v. Billing*, 2 Jur. N. S. 483; and perhaps *Jones v. Price*, 6 Sim. 255, may be supported on this principle. See, too, *Smith v. Pepper*, 27 B. 86; *Best v. Stonehewer*, 34 B. 66; 2 D. J. & S. 537.

A power to appoint to descendants does not authorise an appointment to the legal personal representative of a descendant though he may happen also to be a descendant. *In re Susanni's Trust*, 26 W. R. 93; 47 L. J. Ch. 65.

#### VI. OFFSPRING.

**Offspring.** Offspring without explanatory context means children. *Tabuleau v. Nixon*, W. N. 1899, 115.

## VII. RELATIONS.

The words "nearest relations" explain themselves, and no reference to the statute is necessary to determine the persons to take. *Smith v. Campbell*, 19 Ves. 400; *Brandon v. Brandon*, 3 Sw. 312; *Re Nash*; *Prall v. Beran*, 71 L. T. 5. See *Goodinge v. Goodinge*, 1 Ves. Sen. 231; *Edge v. Salisbury*, Amb. 70.

Nearest  
relations  
means next  
of kin.

But the terms "relations" or "near relations" or "friends and relations" or "relations or friends" are of indefinite meaning, and the Courts, when compelled to determine the persons to take, have restricted them to relations capable of taking within the Statutes of Distribution, both as regards realty and personalty. *Gover v. Mainwaring*, 2 Ves. Sen. 86, 110; *Whitehorn v. Harris*, 2 Ves. Sen. 527; *Walter v. Maunde*, 19 Ves. 424; *Thwaites v. Over*, 1 Taunt. 263; *Salisbury v. Denton*, 3 K. & J. 529; *Re Caplin's Will*, 2 Dr. & Sm. 527.

Relations.

The persons pointed out by the statute take *per capita*, and not in the proportions fixed by the statute, and as joint tenants unless they take by implication from a distributive power, when they take as tenants in common. *Tiffin v. Longman*, 15 B. 275; *Eagles v. Le Breton*, 15 Eq. 148; *In re Patterson*; *Dunlop v. Greer*, (1899) 1 Ir. 324.

But they take in the proportion directed by the statute where the gift is to relations, share and share alike, as the law directs. *Fielden v. Ashworth*, 20 Eq. 410.

A power to select relations extends to relations generally. *Harding v. Glyn*, 1 Atk. 469; 5 Ves. 501.

Power to  
select.

But a power to distribute does not, and in default of appointment the Court will restrict the relations to those who can take under the statute. Lord Selborne's Act (37 & 38 Vict. c. 37) has not altered the law in this respect. *Pop. v. Whitcombe*, 3 Mer. 689; *Grant v. Lynam*, 4 Russ. 292; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Lawlor v. Henderson*, 1 R. 10 Eq. 150; *In re Deakin*; *Starkey v. Eyres*, (1894) 3 Ch. 565; *In re Patterson*; *Dunlop v. Greer*, (1899) 1 Ir. 324.

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Of course, the testator may, by explanatory words, extend the word relations to persons not within the statute. *Derisme v. Mellish*, 5 Ves. 529; *Hibbert v. Hibbert*, 15 Eq. 372. See *Bennett v. Honywood*, Amb. 708.

As to the effect of a power to the wife to appoint to her relations where she was illegitimate and childless, see *In re Deakin*; *Starkey v. Eyres*, *supra*.

*Primâ facie* the class of relations to take is to be ascertained at the death of the propositus.

Therefore, where the gift is immediate or in remainder to the testator's relations, after gifts to persons who are some of the next of kin, his next of kin at his death alone take. *Rayner v. Mowbray*, 3 B. C. C. 234; *Masters v. Hooper*, 4 B. C. C. 207; *Pearce v. Vincent*, 1 Cr. & M. 598; 2 M. & K. 800; 2 Sc. 347; 2 Bing. N. C. 328; 2 Kee. 230; see *Eagles v. Le Breton*, 15 Eq. 148, where there is a discrepancy between the head-note and the judgment; see 42 L. J. Ch. 362. See *Stert v. Platel*, 5 Bing. N. C. 434.

If the gift is to such relations as survive the tenant for life the class is ascertained at the death of the ancestor, while those who die before the tenant for life are excluded. *Bishop v. Cappel*, 1 De G. & S. 411; *Re Nash*; *Prall v. Becan*, 71 L. T. 5.

The term relations, however, has not the same direct reference to the death of the propositus as heirs or next of kin, and therefore, where there is a gift to A. either for life with remainder to her children, or to A. absolutely, followed by a gift over, if A. dies without issue, to the testator's relations, and A. is the sole next of kin at the date of the will and death, the class will be ascertained at A.'s death. *Marsh v. Marsh*, 1 B. C. C. 293; *Jones v. Colbeck*, 8 Ves. 38; *Lees v. Massey*, 3 D. F. & J. 113; see *post*, p. 310 *seq.*

And the testator may himself fix the time at which his relations are to be ascertained; for instance, by directing his relations to be advertised for at the death of a tenant for life, and giving the property to such of them as claim within two months after such advertisements. *Tiffin v. Longman*,

When the class to take under a gift to relations is to be ascertained.

Gift to such relations as survive the tenant for life.

Where the tenant for life is sole next of kin at the date of the will and death.

15 B. 275; see *Re Nash*; *Prall v. Beran*, 71 L. T. 5, where the case is doubted. Chap. XXV.

Where there is a power to appoint to relations and no gift in default of appointment:—

When the class to take in default of appointment is to be ascertained.

1. If there is no life interest, and the power is a general power to appoint to the testator's relations, it seems the class to take will be ascertained at the death of the testator and not when the power expires. *Cole v. Wade*, 16 Ves. 27; in which case, however, the actual point did not arise, since the next of kin at the testator's death, and the time when the power expired, were the same.

2. If there is a life interest and the tenant for life has power to appoint to the testator's or his own relations, the class is to be ascertained at the death of the tenant for life, whether the power is to appoint by deed or will. *Harding v. Glyn*, 1 Atk. 468; *Birch v. Wade*, 3 V. & B. 198; *In re Patterson*; *Dunlop v. Greer*, (1899) 1 Ir. 324; see, too, *Brown v. Higgs*, 8 Ves. 561.

And it makes no difference whether the power is one of selection or distribution merely. *Pope v. Whitcombe*, 3 Mer. 689, as corrected by Lord St. Leonards on Powers, 662, and *Finch v. Hollingsworth*, 21 B. 112; *Caplin's Will*, 2 Dr. & Sm. 527; see, too, *A.-G. v. Doyley*, 4 Vin. Ab. 485, where the tenant for life and the donee of the power were different persons, and the class was ascertained at the death of the tenant for life.

### VIII. FAMILY—FRIENDS.

The word family may have a different meaning, according to the context. Family.

1. In the case of devises of land:—

“If land be devised to a stock or family or house it shall be understood of the heir principal of the house.” *Cownden v. Clarke*, Hob. 38. Devise of lands.

This will be the case where the word is used as a quasi-word of limitation, where for instance, after a devise to a person, there is a direction that the property is to remain in

Chap. XXV. his family. *Chapman's Case*, Dyer, 333; *Doe d. Chattaway v. Smith*, 5 Mau. & S. 126; *Griffiths v. Evan*, 5 B. 241.

A devise to A. and his family according to seniority, gives A. an estate tail. *Lucas v. Goldsmid*, 29 B. 657.

So, too, a devise of land to A. for life "in confidence that after her decease she will devise the property to my family," goes to the testator's heir-at-law upon A.'s death. *Wright v. Athyns*, 17 Ves. 255; 19 Ves. 299.

Direction to  
secure for  
family.

Under a direction to secure property for the benefit of a person and his family the realty will be settled for life with successive remainders in tail, and the personalty will be settled for life with remainder to the children. *White v. Briggs*, 15 Sim. 17; 2 Ph. 583; *Woolmore v. Burrows*, 1 Sim. 512.

Bequest of  
personalty to  
family.

2. It is now settled that in a bequest of personalty or a mixed bequest of realty and personalty to the family of a person, the primary meaning of family is children. *Barnes v. Patch*, 8 Ves. 604; *Terry's Will*, 19 B. 580; *Wood v. Wood*, 8 Ha. 65; *Parkinson's Trusts*, 1 Sim. N. S. 242; *Beales v. Crisford*, 13 Sim. 592; *Burt v. Hellyar*, 14 Eq. 160; *Pigg v. Clarke*, 3 Ch. D. 672; *In re Hutchinson & Tenant*, 8 Ch. D. 540; *In re Mulqueen*, 7 L. R. Ir. 127; *Re Muffett*; *Jones v. Mason*, 55 L. T. 671; *In re Battersby's Trusts*, (1896) 1 Ir. 600; see *Woods v. Woods*, 1 M. & Cr. 401.

It has been held that the word includes an illegitimate son. *Lambe v. Eames*, 10 Eq. 267; 6 Ch. 597; *Humble v. Bowman*, 47 L. J. Ch. 62.

3. There is more difficulty in ascertaining the meaning if the gift is to the A. family or to the family of A., where A. is merely a surname and there are several persons of that name. In such cases the Court will if possible ascertain who is meant, and the gift will go to his children. *Gregory v. Smith*, 9 Ha. 708; *Commissioners of Charitable Donations v. Deey*, 27 L. R. Ir. 289.

4. In order to give the word a different meaning there must be some special circumstances.

May mean  
next of kin.

a. Thus, if there are no children, next of kin may take. *Re Maxton*, 4 Jur. N. S. 407.

b. So a gift to the family of an unmarried person would

probably extend to all her relatives. *Snow v. Teed*, 9 Chap. XXV. Eq. 622.

c. In some cases, on the context, family has been held to mean those of a man's household, thus including a wife or husband. *Macleroth v. Bacon*, 5 Ves. 158; *Blackwell v. Bull*, 1 Kee. 176.

In the widest sense it may include a husband or wife.

d. Family has been held to include all descendants in existence at the time of distribution; but such a construction would not be adopted without a strong context. *Williams v. Williams*, 1 Sim. N. S. 358.

When it includes all descendants.

e. It would seem that a power to appoint to a person's family would be limited to his children if there are any. *In re Hutchinson & Tenant*, 8 Ch. D. 540; see *Sinnott v. Walsh*, 5 L. R. Ir. 27.

Power to appoint to family.

If there are no children the donee of the power may select relations not within the degree of next of kin. *Grant v. Lynam*, 4 Russ. 292.

If the power is not exercised the statutory next of kin are entitled. *Crucys v. Colman*, 9 Ves. 319.

5. Where it is clear that the testator has used the word family in a wider sense than any of those here mentioned, but it is uncertain who were meant to be included, the gift will be void for uncertainty. *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; see *Robinson v. Waddelow*, 8 Sim. 134; *In re Cullimore's Trusts*, 27 L. R. Ir. 18.

When family is construed children, a simple gift to the families of A. and B. goes *per capita* in joint tenancy. *Gregory v. Smith*, 9 Ha. 708.

Whether a gift to several families goes *per capita* or *per stirpes* among them.

So, too, a gift to be divided between the families of A. and B. goes to all the children of A. and B. *per capita* as tenants in common. *Barnes v. Patch*, 8 Ves. 604; see, however, *Alexander v. Douglas*, Rom. N. of C. 93.

Under a direction that after the death of the testator's wife, to whom a life interest in lands was given, the lands should revert to the testator's friends, the heir-at-law was held entitled. *Cooqan v. Hayden*, 4 L. R. Ir. 585.

Friends.

## CHAPTER XXVI.

GIFTS TO HEIRS, NEXT OF KIN, REPRESENTATIVES, AND  
EXECUTORS.**Chap. XXVI.**

Devise of  
Borough  
English and  
Gavelkind  
lands to the  
heir.

WHERE Borough English or gavelkind lands are devised with other lands to the testator's heir, the common law heir is entitled. *Davis v. Kirk*, 2 K. & J. 391; *Thorp v. Owen*, 2 Sm. & G. 90; *Buchanan v. Harrison*, 1 J. & H. 662; *Sladen v. Sladen*, 2 J. & H. 369.

So where Borough English lands alone are devised to A. for life, with remainder to her sons and daughters and their heirs, and if A. dies without having such heirs, to the testator's sons and daughters then living and the heirs of those who may be deceased, the common law heir takes under the ultimate gift. *Polley v. Polley*, 31 B. 363.

In the same way a devise of gavelkind lands alone to the testator's right heirs goes to the common law heir. *Garland v. Bererley*, 9 Ch. D. 213.

In what cases  
the word heir  
refers to a  
*persona*  
*designata*.

The rule is that "*nemo est hæres viventis*," and therefore a devise to the heirs of a living person is contingent, unless the term heirs is so qualified by express words or by the general intention of the will as to show that the testator meant by heir the heir apparent or presumptive or some other person, who will then take as *persona designata*.

This will be the case if the testator speaks of the heirs of the body of B. now living. *Burchett v. Durdant*, 2 Vent. 311; Carth. 154; see *Chambers v. Taylor*, 2 M. & Cr. 376.

Or the intention of the testator to use the term as designating a person may be gathered from the whole will; if, for instance, the so-called heir is directed to pay annuities to certain persons



during whose life he cannot be strictly heir. *Darbison d. Long v. Beaumont*, 1 P. W. 229; 3 B. P. C. 60; *Goodright v. White*, 2 W. Bl. 1010; *Winter v. Perratt*, 9 Cl. & F. 606. Chap. XXVI.

A devise to the heirs and assigns of "A., as if she had continued sole and unmarried," is a gift to the person filling the character as *persona designata*. *Brookman v. Smith*, L. R. 6 Ex. 291; *ib.* 7 Ex. 271; *Dormer v. Phillips*, 4 D. M. & G. 855; 3 Dr. 39; *Fearne*, C. R. 209—212.

The persons, if more than one, who constitute the heir take as joint tenants. *Swaine v. Burton*, 15 Ves. 365; *Mounsey v. Blamire*, 4 Russ. 384; *Berens v. Fellowes*, 56 L. T. 391; *In re Baker*; *Pursey v. Holloway*, 39 L. T. 343; see also *Moore v. Simkin*, 31 Ch. D. 95. Co-heirs take as joint tenants.

The appointment or acknowledgment of a person as heir, though he may not be the real heir, is sufficient to carry to him the testator's real estate. *Parker v. Nickson*, 1 D. J. & S. 177; 11 W. R. 533; 32 L. J. Ch. 397. Acknowledgment of a person as heir.

A devise to the right heirs male, or to the right heirs of a particular name, will go only to the very heir, who must be a male or of that name. *Ashenhurst's Case*, Hob. 34; *cit. Counden v. Clarke*, Moore, 860, pl. 1181; Hob. 29; *Wrightson v. Macaulay*, 14 M. & W. 214; *Thorpe v. Thorpe*, 32 L. J. Ex. 79; see Co. Litt. 24b, note by Hargrave. Devise to the heir of a particular name or to heirs male.

If the devise is to the right heirs exclusive of A., who is the right heir, the devise fails. *Goodtitle d. Bailey v. Pugh*, *Fearne*, Cont. Rem. 573; 2 Mer. 348.

The rule does not, however, apply to heirs of the body, whether taking by descent or purchase. *Wills v. Palmer*, 5 Burr. 2617; 2 W. Bl. 687; *Evans d. Weston v. Burtenshaw*, Co. Litt. 164a, n.(2). Heirs of the body.

An heir male taking by inheritance must trace his descent entirely through males. Co. Litt. 25a. Whether the heir male taking by purchase must trace his descent through males.

It is said by Jarman, ii. p. 912 (5th Ed.), that this does not apply to a gift to the heir male or female by purchase, citing Hob. 31; Co. Litt. 25b. At any rate it is clear that if the word lineal be added the heir must trace his descent through males. *Oddie v. Woodford*, 3 M. & Cr. 584; *Bernal v. Bernal*, 3 M. & Cr. 559; and see *Doe d. Angell v. Angell*, 9 Q. B. 328; *Theellusson v. Rendlesham*, 7 H. L. 429.

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It appears, however, to be concluded by authority that, even in the absence of the word *lineal*, the heir male taking by purchase must claim through males. *Lywood v. Kimber*, 29 B. 38. See per Lord St. Leonards, 7 H. L. 512; and see *Doe d. Winter v. Perratt*, 3 M. & Sc. 594.

Heir *ex parte*  
*maternâ*.

Under a devise to the heir *ex parte maternâ* a person who is also heir *ex parte paternâ* may take. *Rawlinson v. Wass*, Ha. 673; *In re Willomier's Trusts*, 16 Ir. Ch. 389.

RULE IN MANDEVILLE'S CASE, CO. LITT. 26B; FEARNE, 80.

Rule in  
*Mandeville's*  
*Case*.

"Where an estate is limited to the heirs special of a particular ancestor, without any estate of freehold limited to the ancestor (either expressly or by implication), it is impossible to effectuate the expressed will of the donor and to make the estate pass through the whole series of the special heirs designated, except by regarding the limitation as if it were an estate tail, which had originally vested in and descended from the ancestor himself, and yet the first taker must take as purchaser, because no estate did in fact vest in or descend from the ancestor." *Vernon v. Wright*, 2 Drew. 439; 7 H. L. 35.

The result is the creation of a quasi-entail, partaking of the opposite qualities of purchase and descent. Thus, where the limitation was to Roberge and the heirs of the body of her late husband John de Mandeville by her, where John de Mandeville had left a son and daughter, it was held that the daughter took on the death of the son *per formam doni*, as the person who would have been entitled if the estate had descended from the ancestor. *Mandeville's Case*, Co. Litt. 26b.

The rule in *Mandeville's Case* applies equally where the limitation is to the heirs of the body of the testator. *Allgood v. Blake*, L. R. 7 Ex. 399; *ib.* 8 Ex. 160.

It has been adopted where the term issue was used. *Whitelock v. Heddon*, 1 B. & P. 243.

But it will not be extended to a devise to the heirs of the body of a deceased person, excluding certain lines of

descent, which would comprehend the real heirs of the body; nor does it apply to a devise to the right heirs male of a person, though a devise to A. and his heirs male gives A. an estate tail. *Allgood v. Blake*, *supra*; *Ashenhurst's Case*, Hob. 84; *Baker v. Wall*, 1 Ld. Raym. 185; *Doe d. Lindsey v. Colyear*, 11 East, 548.

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And it does not apply where the limitation is to heirs general. *Moore v. Simkin*, 31 Ch. D. 95.

Heirs of the body, however, used as a term of purchase, may mean children if the devise is to them as their parent shall appoint, or if they are to take equally among them as tenants in common. *Jordan v. Adams*, 9 C. B. N. S. 483; *Right v. Creber*, 5 B. & Cr. 866; in which case the estate of the ancestor being equitable did not coalesce with the limitation to the heirs.

In what cases heirs of the body means children.

#### ASSIGNS.

As a rule the words "and assigns," following the word heirs, have no operation; "they have no conveyancing virtue at all, but are merely declaratory of that power of alienation which the purchaser would have had without them." Wms. R. P. 142; *Brookman v. Smith*, L. R. 6 Ex. 291.

Assigns.

It has, however, been held that a legal limitation to the heirs and assigns of a person, who had a prior equitable life estate, gave that person a general power of appointment over the property. *Quested v. Michell*, 24 L. J. Ch. 722. See, too, *Tapner v. Marlott*, Willes, 177; and *A.-G. v. Vigor*, 8 Ves. 256, 291; but it is unlikely that this construction will be extended.

The effect, however, of a gift to A. or his heirs or assigns, is to give the absolute interest to A. *Wilton's Estate*, 8 D. M. & G. 173; *Hopkins' Trust*, 2 H. & M. 411. See *post*, p. 316.

#### BEQUESTS OF PERSONALTY TO HEIRS.

1. A bequest of personalty to the right heirs, or to the heirs-at-law, or the next heir of an individual, *primâ facie* goes to

Bequests of personalty to heirs.

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such heir as *persona designata*, whether the bequest be to the heirs of the testator or of a stranger. *Mounsey v. Blamire*, 4 Russ. 384; *Hamilton v. Mills*, 29 B. 193; *De Beauvoir v. De Beauvoir*, 3 H. L. 524; *Re Rootes*, 1 Dr. & Sm. 228; *Southgate v. Clinch*, 27 L. J. Ch. 651; 4 Jur. N. S. 428.

The rule applies, *à fortiori*, to a mixed fund. *De Beauvoir v. De Beauvoir*, 3 H. L. 524; *Boydell v. Golightly*, 14 Sim. 327; *Todhunter v. Thompson*, 26 W. R. 883.

A. for life,  
remainder to  
heirs.

2. In the same way, if the gift is to A. for life with remainder to his heirs, the heir, in the strict sense, is entitled. *In bonis Dixon*, 4 P. D. 81; *Smith v. Butcher*, 10 Ch. D. 113; disapproving *Mounsey v. Blamire*, 4 Russ. 384; see *Re Russell*, 52 L. T. 559. The cases of *Evans v. Salt*, 6 B. 266; *Low v. Smith*, 25 L. J. Ch. 508; 2 Jur. N. S. 344; *Re Peppitt's Estate*; *Chester v. Phillips*, 36 L. T. 500, must be considered overruled, unless they can be supported on the special context in each case.

In what cases  
heirs means  
next of kin.

3. But the word heirs may be controlled by the context, as in *Gamboa's Trust*, 4 K. & J. 757, where a bequest to "the heirs of my late partner for losses sustained during the time that the business of the house was under my sole control," went to the next of kin under the statute; and in *In re Newton's Trusts*, 4 Eq. 171, where the bequest "the heirs and assigns of my deceased sister" was shown to be quasi substitutional by other limitations to the testator's living brothers and sisters and their heirs and assigns; and see *In re Steevens' Trusts*, 15 Eq. 110, as to which case *quære*.

Where the intention is to give A. the absolute interest, the word heirs has been held equivalent to executors and administrators. *Powell v. Boggis*, 35 B. 535, where the gift was to A. for life, then to her heirs as she shall give it by will, and if she dies without a will to her right heirs.

And, where the testator directs a division amongst the several heirs of tenants for life, who are related to each other, so that heirs cannot mean next of kin, heirs will mean children. *Bull v. Comberbach*, 25 B. 540; see *Roberts v. Edwards*, 33 B. 259.

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gift to heirs.

4. In a gift to A. or his heirs, heirs means the persons entitled under the statute. *Taux v. Henderson*, 1 J. & W.

388; *Gittings v. McDermott*, 2 M. & K. 69; *Jacobs v. Jacobs*, Chap. XXVI. 16 B. 557; *Doody v. Higgins*, 9 Ha. App. 32; 2 K. & J. 729; *In re Craren*, 23 B. 333; *Powell v. Boggis*, 35 B. 585; *Parsons v. Parsons*, 8 Eq. 260; *Neilson v. Monro*, 27 W. R. 936; *In re Stannard* · *Stannard v. Burt*, 52 L. J. Ch. 854.

If real and personal estate are given together to persons or their heirs, but the realty is not converted, the realty goes to the heir and the personalty to the statutory next of kin. *Wingfield v. Wingfield*, 9 Ch. D. 658; *Keay v. Boulton*, 25 Ch. D. 212.

In a bequest to children or their heirs, followed by a gift over if all the children die without issue, the word heirs has been held to mean issue. *Speakman v. Speakman*, 8 Ha. 180; and see *Roberts v. Edwards*, 12 W. R. 33.

In a bequest to A. or the heirs of his body, heirs of the body means such of the persons entitled under the statute as may be descendants of A. *Pattenden v. Hobson*, 17 Jur. 406; 22 L. J. Ch. 697.

A widow is included in the persons entitled under the statute, and the statute fixes not only the persons but the proportions in which they take. *In re Steeven's Trusts*, 15 Eq. 110; *Jacobs v. Jacobs*, *supra*; *Doody v. Higgins*, *supra*.

A bequest of personalty to "the heirs or next of kin of A." has been construed as a gift to next of kin. *In re Thompson's Trusts*, 9 Ch. D. 607; see p. 307.

#### NEXT OF KIN.

The words next of kin, without more, mean the nearest blood relations of the propositus in an ascending and descending line, and they take as joint tenants. *Elmsley v. Young*, 2 M. & K. 780; *Withy v. Mangles*, 10 Cl. & F. 215; *Lucas v. Brandreth*, 28 B. 274; *Avison v. Simpson*, Johns. 43; *Halton v. Foster*, L. R. 3 Ch. 505.

The same meaning has been given to the words "legal or next of kin." *Harris v. Newton*, 46 L. J. Ch. 268; 25 W. R. 228.

Those of the half-blood are equally entitled with those of the whole blood. *Collingwood v. Pace*, 1 Vent. 424; *Brown v.*

**Chap. XXVI.** *Wood*, Alleyn, 36; *Brigg v. Brigg*, 33 W. R. 454; see 2 Wms. Exors. 981.

Gift under power. But a selective power to appoint to next of kin will authorise an appointment to statutory next of kin. *Snow v. Teed*, 9 Eq. 622.

Next of kin *ex parte maternâ*. Under a gift to next of kin *ex parte maternâ*, next of kin *ex parte paternâ*, who happen to be also next of kin *ex parte maternâ*, will not be excluded, except by express words. *Gundry v. Pinniger*, 14 B. 94; 1 D. M. & G. 502; *Say v. Creed*, 5 Ha. 580.

The effect of a reference to the statute or intestacy. If there is a gift to next of kin or next of kin in blood followed by an express reference to the statute or intestacy, all kindred entitled under the statute, including those who take by representation under the statute, will come in. *Garrick v. Lord Camden*, 14 Ves. 372; *Bullock v. Downes*, 9 H. L. 1; *Nichols v. Haviland*, 1 K. & J. 504; *In re Gray*; *Akers v. Sears*, (1896) 2 Ch. 802.

Widow does not take as next of kin. A widow, though she is a person entitled under the statute, is not of kin, and therefore cannot take under the description "next of kin by statute." *Garrick v. Lord Camden*, 14 Ves. 372; *Kilner v. Leech*, 10 B. 362; *In re Fitzgerald*, 58 L. J. Ch. 662; 61 L. T. 221; 37 W. R. 552.

Husband not entitled under statute. A husband does not take under the statute at all but by a title paramount; therefore, he can take neither under the description "next of kin by statute" nor under the description of "persons entitled under the statute." *Milne v. Gilbert*, 2 D. M. & G. 715; 5 D. M. & G. 510.

If a husband has been expressly excluded in a gift to next of kin under the statute, a widow will be admitted under a subsequent gift to next of kin by statute where there is no such exclusion. *In re Collins' Trusts*, W. N. 1877, 87.

If only an intention is declared of leaving property to next kin according to the statute, which is not carried out, the property goes as on an intestacy, and a widow would therefore be admitted. *Ash v. Ash*, 33 B. 187.

What will exclude one of the next of kin from a gift to next of kin. A person is not excluded from taking property under a gift to next of kin by the fact that a life interest in the property is expressly given to him. *Gorbell v. Davison*, 18 B. 556.

But if the gift is to the "other the next of kin," one of the

next of kin to whom an interest is expressly given by the will will be excluded. *Cooper v. Denison*, 18 Sim. 290. Chap. XXVI.

If there is a reference to the statute, the statute regulates the nature of the interest, as well as the persons, who are to take under it. *Bullock v. Downes*, 9 H. L. 1; *In re Ranking's Settlement Trusts*, 6 Eq. 601.

Whether the statute regulates the nature of the interest as well as the persons to take.

The above proposition seems to be justified by the opinions expressed in *Bullock v. Downes*, and would probably be now adopted. However, the cases go to this :—

1. Where there is a reference to intestacy, as well as to the statute, the statute fixes the proportions as well as the persons. *Bullock v. Downes*, *supra*; *Martin v. Glover*, 1 Coll. 270; *Jenkins v. Gower*, 2 Coll. 537.

2. So, where the gift is to persons "entitled under" or "under and according to" the statute. *Horn v. Coleman*, 1 Sm. & G. 169; *In re Ranking's Settlement Trusts*, *supra*.

3. If the gift is merely to persons according to the statute, the better opinion seems to be that the same result would follow. *Mattison v. Tanfield*, 3 B. 131; *Lewis v. Morris*, 19 B. 34; *In re Ranking's Settlement Trusts*, 6 Eq. 601, not following *In re Greenwood's Trusts*, 3 Giff. 390.

4. Words importing or directing a tenancy in common will not prevent the statute from fixing the proportions. *Mattison v. Tanfield*, *supra*; *Lewis v. Morris*, *supra*. *Richardson v. Richardson*, 15 Sim. 526, must be considered overruled; see *Bullock v. Downes*, *supra*.

5. It would seem that a gift *equally* among the persons entitled under the statute would prevent the statute from fixing the proportions. See *Phillips v. Garth*, 3 B. C. C. 69.

But if there are words importing that the distribution is to be according to the statute, the word *equally* will be rejected. *Holloway v. Radcliffe*, 23 B. 163; see *Fielden v. Ashworth*, 20 Eq. 410.

A devise of land to the nearest of kin by way of heirship goes to the heir. *Williams v. Ashton*, 1 J. & H. 115.

Nearest of kin by way of heirship.

A gift to "next of kin or heir-at-law" would probably go according to the nature of the property. *Loundes v. Stone*, 4 Ves. 649; see *In re Thompson's Trusts*, 9 Ch. D. 607.

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Next of kin  
in the male  
line.

In *Boys v. Bradley*, 10 Ha. 389; 4 D. M. & G. 58; 5 H. L. 878, "next of kin in the male line in preference to the female line" was held to mean next of kin *ex parte paternâ*.

A devise of land to the next male kin goes to all the nearest of kin being males living at the testator's death. *In re Chapman*; *Ellick v. Cox*, 82 W. R. 424.

Devise to  
"nearest" of  
a class.

A devise of land to the "next" or "nearest" of a particular class of relations goes to the eldest of the class. *Perriman v. Pearce*, Co. Litt. 10b, n. 2; *Power v. Quealy*, 2 L. R. Ir. 227; 4 *ib.* 20, where the devise was to the "nearest, and most deserving male cousin, and a regular Power of the family."

On the other hand, in a gift of real and personal estate, together to the nearest relation of a particular name the word relation has been held to be *nomen collectivum*, and to include all the relations of the same degree. *Pyot v. Pyot*, 1 Ves. Sen. 335; Belt. 169.

Next of kin  
of a particular  
name.

A devise of land to "next of kin of a particular name" goes only to next of kin who are by birth entitled to the name. A next of kin who assumes the name or a daughter of that name who at the testator's death has changed her name by marriage is excluded. *Leigh v. Leigh*, 15 Ves. 100; *Jobson's Case*, Cro. El. 576; see *Bon v. Smith*, Cro. El. 532.

But it may appear from the will that the assumption of the name by royal licence is intended to be sufficient. *In re Roberts*; *Repington v. Roberts-Gawen*, 19 Ch. D. 520.

Possibly, in the case of personalty, or of real and personal estate given together, a reference to a particular name may be more readily understood as referring to the stock or family.

At any rate, it may be so understood if there is an explanatory context.

Thus, "nearest relation of the name of the Pyots" has been held to refer to the stock of the Pyots, so that change of name by marriage was immaterial. *Pyot v. Pyot*, 1 Ves. Sen. 335.

A similar construction was put upon "next of kin of the surname of Crump." *Carpenter v. Bott*, 15 Sim. 606; see, too, *Mortimer v. Hartley*, 6 Ex. 47.

Whether the person who is to take under the description of



a particular name, must satisfy both parts of the description is uncertain: see *Doe v. Plumptre*, 3 B. & Ald. 474, and the remarks of the Vice-Chancellor on that case in *Carpenter v. Bott*, 15 Sim. 606. Chap. XXVI.

A gift to next of kin, to be ascertained at a particular time exclusive of A., who is the sole next of kin, goes to the persons who would have been next of kin if A. also had been dead. *White v. Springett*, 4 Ch. 300. Gift to next of kin exclusive of A., who is sole next of kin.

The persons to take will be ascertained in the same way, if the gift is to next of kin by statute simply exclusive of A., who happens to be sole next of kin by statute. *Re Taylor; Taylor v. Ley*, 45 L. T. 210; 52 L. T. 889.

Under a limitation to the statutory next of kin of B., exclusive of A. and his representatives, it was held that the daughters of A., who were among the statutory next of kin of B., as representing A., were excluded. *Lindsay v. Ellicott*, 46 L. J. Ch. 878.

The testator may show that he meant by next of kin the children of a tenant for life, as, where the gift was to a daughter for life and then to the testatrix's next of kin, to be vested interests from the testatrix's death, "except as to any child afterwards born of the daughter." *Bird v. Wood*, 2 S. & St. 400; see 2 M. & K. 86, 89. Next of kin explained by the context.

In a gift to the next of kin of A., or even to the person entitled under the Statutes of Distribution, as if she had died intestate and unmarried, unmarried will be construed as equivalent to "without leaving a husband," since otherwise children would be excluded. *Hoare v. Barnes*, 3 B. C. C. 316; *Day v. Barnard*, 1 Dr. & S. 351; *Saunders' Trusts*, 3 K. & J. 152; *Norman's Trusts*, 3 D. M. & G. 965; *Maugham v. Vincent*, 9 L. J. Ch. 329; *Clarke v. Colls*, 9 H. L. 601. Gift to next of kin of A. as if she had died unmarried.

Where the testator, a widower, expressly excluded a granddaughter from a bequest in favour of his "next of kin as if he had died unmarried," it was held that unmarried meant wifeless. *Carreth v. Heiron*, W. N. 1879, 145.

In a marriage settlement a limitation in favour of the next of kin of the wife as if she had died "without having been married," where there was a declaration that a named Without having been married.

**Chap. XXVI.** illegitimate daughter should, for the purposes of the trust, be deemed to be a lawful child, has been held to mean as if the wife had died without having been married to her then intended husband. *Wilson v. Atkinson*, 4 D. J. & S. 455.

A similar construction has been adopted in marriage settlements, where there was no explanatory context, and the words have even been held to be equivalent to "without leaving a husband." *In re Ball's Trusts*, 11 Ch. D. 270; *Upton v. Brown*, 12 Ch. D. 872; *In re Arden*, W. N. 1890, 204; *Stoddart v. Saville*, (1894) 1 Ch. 480; not following *Emmins v. Bradford*, 13 Ch. D. 493; *Hardman v. Maffett*, 13 L. R. Ir. 499.

In a will there is no doubt that such clear words as "without ever having been married" must be construed in their natural sense, unless there is a strong context. *Re Watson's Trusts*, 55 L. T. 316.

At what time  
next of kin  
and heirs  
are to be  
ascertained.

The terms next of kin and heirs have a direct reference to the death of the ancestor, and therefore next of kin and heirs are to be ascertained at the death of the ancestor, and, where there is in addition a reference to the statute or to intestacy, this rule is almost without exception.

A mixed fund  
is no excep-  
tion to the  
ordinary rule.

The same rules apply to realty, personalty, and to a mixed fund. *Cusack v. Rood*, 24 W. R. 391.

1. Thus the rule applies, whether the bequest to next of kin is immediate or preceded by a life interest or contingent. *Moss v. Dunlop*, Joh. 490; *Bird v. Luckie*, 8 Ha. 301.

2. And if the gift is to next of kin living at a particular time, it will go to such of the next of kin at the testator's death as are living at that time. *Spink v. Lewis*, 3 B. C. C. 355; *Re Nash*; *Prall v. Beran*, 71 L. T. 5.

3. If there is a devise to A. for life with remainder to his eldest son for life, with a direction on his death to convey the estate to the heir male of A., the eldest son of A. is entitled on A.'s death to have the fee conveyed to him. *In re Grayson*, 48 L. J. Ch. 354.

Similarly, if personalty is given to A. for life, and then to the testator's next of kin, though A. may be one of the next of kin, or even the only next of kin, at the testator's death, or

even the only next of kin at the date of the will as well as at the testator's death, the class will nevertheless be ascertained at the testator's death. *Doe v. Lawson*, 3 East, 278; *Elmsley v. Young*, 2 M. & K. 780; *Ware v. Rowland*, 2 Ph. 635; *Holloway v. Holloway*, 5 Ves. 399; *Barker's Trust*, 1 Sm. & G. 118; *Gorbell v. Davison*, 18 B. 556; *Starr v. Newberry*, 23 B. 436; *Re Ford*; *Patten v. Sparks*, 72 L. T. 5.

The mere exception from the class of next of kin of certain persons, who could only be members of the class on the supposition of the death of the tenant for life, will not alter the time for fixing the class. *Lee v. Lee*, 1 Dr. & Sm. 85; see *Cooper v. Denison*, 18 Sim. 290.

4. The same rules apply, where the gift to the next of kin is not by way of remainder, but by way of executory limitation.

Thus, in a gift to A. for life, where A. is sole next of kin at the date of the will and death, and then to her children, or to A. absolutely, and if she dies without children, or under twenty-one, to the testator's next of kin, the next of kin are ascertained at the testator's death. *Lang's Will*, 9 W. R. 589; *Murphy v. Donegan*, 3 J. & Lat. 534; *Baker v. Gibson*, 12 B. 101; *Harrison v. Harrison*, 28 B. 21; *Michell v. Bridges*, 13 W. R. 200; see *Urquhart v. Urquhart*, 13 Sim. 613; *Minter v. Wraith*, 14 Sim. 549; *Hunter v. Tedlie*, 7 L. R. Ir. 448.

Executory  
gift to next  
of kin.

The case is, however, different, if the gift is not to next of kin, but to the "nearest of kin of my own family," or to relations. *Clapton v. Bulmer*, 5 M. & Cr. 108; see pp. 296, 297.

In the former case the intention is to let the property go as the law would give it, in the latter to make a complete disposition by the will to a particular class contemplated by the testator, though, owing to the vagueness of the description, the Courts may be compelled to have recourse to the statute, that the gift may not be void for uncertainty.

5. Even if the gift be to a class of persons, who must be the testator's next of kin if any survive him, and if they die without issue to his next of kin, the next of kin are ascertained at his death. *Seifferth v. Badham*, 9 B. 372.

6. The testator may of course direct the class of next of

**Chap. XXVI.** kin to be ascertained at any time or in any manner he chooses. *Pinder v. Pinder*, 28 B. 44; *White v. Springett*, 4 Ch. 300.

Effect of words of futurity in ascertaining the class.

The mere use of words of futurity will not alter the ordinary rule; for instance, if the bequest be to A. for life and after his death for such persons, as shall be my next of kin. *Holloway v. Holloway*, 5 Ves. 399; *Doe v. Lawson*, 3 East, 278; *Rayner v. Morbray*, 3 B. C. C. 234.

But, if the gift is, after the decease of the tenant for life, to such persons as shall *then* be my next of kin, the word "*then*" must refer to the death of tenant for life. *Long v. Blackall*, 3 Ves. 486; *Wharton v. Barker*, 4 K. & J. 483; see *Cloves v. Hilliard*, 4 Ch. D. 413; *In re Morley's Trusts*, 25 W. R. 825; *Valentine v. Fitzsimons*, (1894) 1 I. R. 98; and in such a case the class is to be ascertained as if the testator had lived up to and died at the time referred to. *Sturge v. Great Western Railway Co.*, 19 Ch. D. 444.

But it must be clear, that the word "*then*" is used temporally and not as equivalent to thereupon, and that it may not be referred to other words pointing to the testator's death, as will be the case if the gift is, for instance, "to such persons as would by virtue of the statutes for the distribution of intestates' estates have become and been then entitled thereto in case I had died intestate." *Bullock v. Downes*, 9 H. L. 1; *Doe v. Lawson*, 3 East, 278; *Cable v. Cable*, 16 B. 507; *Wheeler v. Adams*, 17 B. 417; *Fletcher v. Fletcher*, 3 D. F. & J. 775; *Day v. Day*, 1 I. R. 4 Eq. 385; *Mortimore v. Mortimore*, 4 App. C. 448.

Where the gift is to the next of kin of a wife as if she had survived her husband and died intestate, the cases, which arise mainly on marriage settlements, are conflicting.

The view that the class is to be ascertained on the husband's death is supported by *Pinder v. Pinder*, 28 B. 44; *Chalmers v. North*, 28 B. 175; *Clarke v. Hayne*, 42 Ch. D. 529; *Re King's Settlement*; *Gibson v. Wright*, 60 L. T. 745. The view that the class is to be ascertained when the wife actually died is supported by *Druitt v. Seaward*, 31 Ch. D. 234; *Re Bradley*; *Brown v. Cottrell*, 58 L. T. 631.

7. By analogy to the case of gifts to the testator's own next of kin, the persons to take under gifts to the next of kin of a deceased person are those who are at the testator's death such next of kin. *Philps v. Erans*, 4 De G. & S. 188; *Wharton v. Barker*, 4 K. & J. 483. Chap. XXVI.  
Gifts to  
next of kin  
of deceased  
person.

The rule is the same if the gift is to the next of kin of a person who is not dead at the date of the will but who dies before the testator's death. *Vaux v. Henderson*, 1 J. & W. 388, n.; *In re Gryll's Trusts*, 6 Eq. 589; *In re Philps' Will*, 7 Eq. 151.

The circumstance that the tenant for life under the will is the sole next of kin at the date of the will so that if the ordinary rule applies he must take if he survives the testator, would probably not alone be sufficient to alter the rule. *Wharton v. Barker*, 4 K. & J. 483. Exceptions to  
the rule.

But if the gift is by a testatrix to such persons as would have become entitled to her husband's personal estate had he died intestate, and without leaving a widow, the next of kin must be ascertained at the husband's death, and if one of them dies before the testatrix there is a lapse as regards his share. *In re Rees*; *Williams v. Davis*, 44 Ch. D. 484; see *In re Ham's Trusts*, 2 Sim. N. S. 106.

8. If the gift is to the next of kin of a person, who survives the testator, the class is ascertained at the death of that person. *Gundry v. Pinniger*, 1 De G. M. & G. 502; *Jacobs v. Jacobs*, 16 B. 557; *Markham v. Ivatt*, 20 B. 579. Next of kin  
of a living  
person.

#### REPRESENTATIVES.

The words representatives, legal representatives, personal representatives, or legal personal representatives, must, in the absence of other controlling words, be taken to mean persons claiming as executors or administrators. *Crawford's Trust*, 2 Dr. 280; *Hinchcliffe v. Westwood*, 2 De G. & Sm. 216; *Dixon v. Dixon*, 24 B. 129; *Re Turner*, 2 Dr. & Sm. 501; *Smith v. Barneby*, 2 Coll. 728; *Leak v. Macdowall*, 33 B. 238; *Wyndham's Trust*, L. R. 1 Eq. 290; *Alger v.* Gift to repre-  
sentatives.

**Chap. XXVI.** *Parrott*, 3 Eq. 328; *Best's Settlement*, 18 Eq. 686; *In re Ware*; *Cumberlege v. Cumberlege-Ware*, 45 Ch. D. 269.

In what cases  
representatives  
mean next  
of kin.

If, however, there is an indication of intention that the representatives are to take beneficially and not in any fiduciary capacity, the words can hardly be referred to executors or administrators, and they will generally mean statutory next of kin, including a widow, but not a husband. *Cotton v. Cotton*, 2 B. 67; *Smith v. Palmer*, 7 Ha. 225; *Holloway v. Radcliffe*, 23 B. 163; *King v. Cleaveland*, 26 B. 166; 4 De G. & J. 477; *In re Horner*; *Eagleton v. Horner*, 37 Ch. D. 710.

It would seem that by analogy to the case of heirs, the statute would fix the proportions as well as the persons, and that *Walker v. Marquis of Camden*, 16 Sim. 329, would not now be followed.

Substitutional  
gift.

1. If the gift is substitutional, as, for instance, to A. or his legal representatives, or even to A., and if he dies before me to his representatives, there is an *à priori* improbability that the testator meant to benefit the estate of the legatee if he died in the testator's lifetime, while the legatee himself could derive no benefit from the legacy unless he survived the testator, and therefore representatives will be read as equivalent to statutory next of kin. *Bridge v. Abbott*, 3 B. C. C. 224; *Cotton v. Cotton*, 2 B. 67; *Re Thompson*; *Machell v. Newman*, 55 L. T. 85; see *Hewetson v. Todhunter*, 22 L. J. Ch. 76.

The next of kin to take are those who would have been next of kin according to the statutes if the legatee had died at the time of the death of the testator. *Bridge v. Abbott*, 3 B. C. C. 224; *Re Thompson*; *Machell v. Newman*, 55 L. T. 85.

If the gift is to several related persons, or their respective representatives, representatives will mean descendants. *Styth v. Monro*, 6 Sim. 49. See *Horsepool v. Watson*, 3 Ves. 383; *Atherton v. Crouther*, 19 B. 448; *In re Booth*; *Fytton v. Booth*, W. N. 1877, 129.

Prior life  
estate.

2. Where there is a prior life estate the reasons for construing "legal representatives" as next of kin do not apply.

The substitutional words may be considered as inserted merely *ex abundanti cautela*, to provide for the death of the legatee in the lifetime of the tenant for life. *In re Crauford*, 2 Dr. 230, 242; *Re Henderson*, 28 B. 656; *Hinchcliffe v. Westwood*, 2 De G. & S. 216; *Chapman v. Chapman*, 33 B. 556; *Re Turner*, 2 Dr. & Sm. 501. Chap. XXVI.

The same is the case where there is a direct gift to A. or his personal representatives, but the time of payment is postponed, or a gift to A., and if he dies before the whole is expended, to his representatives. *Thompson v. Whitelock*, 4 De G. & J. 490; *Dixon v. Dixon*, 24 B. 129.

3. If there are words of distribution, such as "to and amongst," or "share and share alike," and similar expressions, showing that the "representatives" are to take beneficially, the legacy will go the statutory next of kin. *King v. Cleaveland*, 4 De G. & J. 477; *Baines v. Ottey*, 1 M & K. 465; *Smith v. Palmer*, 7 Ha. 225. Words of distribution.

This, however, does not apply where the gift being to the representatives of several persons who take life interests, the words of distribution can be referred to the *stirpes*. *Wing v. Wing*, 24 W. R. 878.

4. If the words executors and administrators have been used in other parts of the will, this is an argument to show that representatives must mean something else. *Jennings v. Gallimore*, 3 Ves. 146; *King v. Cleaveland*, 4 De G. & J. 477; *Nicholson v. Wilson*, 14 Sim. 549; *Walker v. Marquis of Camden*, 16 Sim. 329; *Briggs v. Upton*, 7 Ch. 376. Where both the words executors and representatives occur.

5. Where there is a direction to pay to personal representatives, the fact that an executor is appointed would be a strong argument in favour of next of kin. *Robinson v. Smith*, 6 Sim. 47; *Walter v. Makins*, 6 Sim. 148; *Jennings v. Gallimore*, 3 Ves. 146. See *Briggs v. Upton*, *supra*. Direction to pay to representatives where an executor is appointed.

6. The same result will follow, if there are words added to the term "representatives" inconsistent with the meaning "executors or administrators," such as "personal representatives or next of kin" (a); or, "such persons as would be the personal representatives of my daughter in case she had died unmarried" (b); or, "legal personal representatives at the Where the term representatives is coupled with explanatory words.

**Chap. XXVI.** time of her death" (c); or, "next legal or personal representatives" (d). *Philps v. Evans*, 4 De & S. 188 (a); *Gryll's Trust*, 6 Eq. 589 (b); *Robinson v. Evans*, 22 W. R. 199; 43 L. J. Ch. 82; *Long v. Blackall*, 3 Ves. 486 (c); *Booth v. Vicars*, 1 Coll. 6; *Stockdale v. Nicholson*, 4 Eq. 359 (d).

Whether, in this latter case, the next of kin proper or the statutory next of kin take, see *Booth v. Vicars*, *supra*; *Stockdale v. Nicholson*, *supra*.

A gift to personal representatives *per stirpes*, and not *per capita*, has been held to mean descendants. *Atherton v. Crowther*, 19 B. 448; *Re Knowles*; *Rainford v. Knowles*, 59 L. T. 359.

For a direction to pay to "legal representatives according to the course of administration," see *Jennings v. Gallimore*, 3 Ves. 146; *Briggs v. Upton*, 7 Ch. 376.

Effect of the word assigns.

It would seem, that the addition of the word assigns in a substitutional gift to heirs or representatives would make it impossible to construe these words as equivalent to next of kin. *Graffey v. Humpage*, 1 B. 46; *Waite v. Templer*, 2 Sim. 524.

## EXECUTORS.

Gift to A. and in case of his death to his executors.

A gift to A., and in case of his death to his executors or administrators, will go to A.'s executors in the event of his death before the testator. *Long v. Watkinson*, 17 B. 471; *Re Seymour's Trusts*, Johns. 472; *Maxwell v. Maxwell*, 1 R. 2 Eq. 478; *In re Clay*; *Clay v. Clay*, 32 W. R. 516; *affd.* 54 L. J. Ch. 648; overruling *Palin v. Hills*, 1 M. & K. 470. See, too, *Aspinall v. Duckworth*, 35 B. 307; *Re Morgan's Trusts*, 2 W. R. 439.

Of course, where there is a future gift to A. or his executors, the word executors will be treated as inserted to provide for the death of the donee before the time of vesting in possession. See *Stocks v. Dodsley*, 1 Kee. 325.

Executors taking substitutionally take in trust

It appears to be now settled, notwithstanding *Evans v. Charles*, 1 Anstr. 128, that executors taking substitutionally take the property to be administered as part of the assets of



the original legatee. *Stocks v. Dodsley*, 1 Kee. 325 ; *Leak v. Macdowall*, 33 B. 238 ; *In re Valdez's Trusts*, 40 Ch. D. 159. Chap. XXVI.

Similarly, a gift to the executors of a dead person is a gift to his legal personal representatives as part of his estate. *Trethewy v. Helyar*, 4 Ch. D. 53.

A general or specific legacy given by a testator to his executors, whether under the title of executors or not, is *prima facie* given to them in that character, and therefore they are not entitled to the legacies if they decline or are incapable of undertaking the office. *Reed v. Devaynes*, 2 Cox, 285 ; 3 B. C. C. 95 ; *Calvert v. Sibbon*, 4 B. 222 ; *Hanbury v. Spooner*, 5 B. 630 ; *Hawkins' Trust*, 33 B. 570 ; *Piggott v. Green*, 6 Sim. 72 ; *Slaney v. Watney*, L. R. 2 Eq. 418 ; *In re Appleton* ; *Barber v. Tebbit*, 29 Ch. D. 893.

for the next of kin.

Gifts to the testator's executors only go to them if they accept the office.

To entitle an executor to receive his legacy, it is sufficient if he either proves the will, which he may do at any time before the estate is fully administered, or if he acts as executor. *Hollingsworth v. Grassett*, 15 Sim. 52 ; *Angermann v. Ford*, 29 B. 349 ; *Harrison v. Rowley*, 4 Ves. 212 ; *Lewis v. Mathews*, 8 Eq. 277.

What is a sufficient acceptance of the office.

And it seems, that if the legacy is directed to be paid within twelve months, and there is nothing to show that the executor refuses to act, he is entitled to his legacy if he survives the twelve months. *Brydges v. Wotton*, 1 V. & B. 134.

But if the executor acts fraudulently, the mere taking out probate will not entitle him to his legacy. *Harford v. Browning*, 1 Cox, 302.

Where an annuity was given to trustees as a recompense for their care and trouble in the execution of the trusts, it was held that the trustees were entitled to the annuity though they employed an agent to collect the rents. *Wilkinson v. Wilkinson*, 2 S. & St. 237.

But the case is different, if an annuity is given expressly for their services in collecting the rents. In such a case if they employ an agent they cannot take the annuity. *Re Muffett* ; *Jones v. Mason*, 55 L. T. 671 ; 56 L. T. 685.

The presumption that a legacy to an executor is given to him in that character for his trouble, is not rebutted by the

In what cases the executor is entitled,

**Chap. XXVI.**

though he  
does not act.

fact that the legacy precedes the appointment of executors, or by the fact that legacies of unequal amount are given to the executors. *In re Appleton* ; *Barber v. Tebbit*, 29 Ch. D. 893 ; see *Wildes v. Davies*, 1 Sm. & G. 475 ; 22 L. J. Ch. 497.

The presumption would probably not now be held to be rebutted by difference in the subject-matter of two bequests to executors. *In re Appleton*, *supra*, where *Jewis v. Laurence*, 8 Eq. 345, is discussed.

The presumption may be rebutted :—

1. If some other motive is expressed, as if the gift is to “my friend and executor.” *Re Denby*, 3 D. F. & J. 350 ; *Dix v. Reed*, 1 S. & St. 237 ; *Cockerell v. Barber*, 2 Russ. 585 ; *Burgess v. Burgess*, 1 Coll. 367 ; *Bubb v. Yelverton*, 13 Eq. 131.

2. If the gift is after a life interest. *In re Reece's Trusts*, 4 Ch. D. 841.

3. If there is a direction that in the event of the executor's death before the testator, his legacy is to go to his next of kin. *In re Bunbury's Trusts*, 1 R. 10 Eq. 408.

4. The presumption does not arise if the gift is of residue. *Parsons v. Saffery*, 9 Pr. 578 ; *Griffith v. Pruett*, 11 Sim. 202 ; *Christian v. Devereux*, 12 Sim. 264.

Whether a  
gift of residue  
to executors  
is beneficial or  
in trust.

Whether a gift of residue to executors is a gift to them for their own benefit, or whether they take in trust for the next of kin, depends on the general scheme of the will, and is not affected by the statute 1 Will. IV. c. 40. *Williams v. Arkle*, L. R. 7 H. L. 606.

Thus the following circumstances are in favour of the executors taking beneficially :—

If the gift is not to the executors as such, but by name. *Williams v. Arkle*, L. R. 7 H. L. 606 ; *Re Henshaw*, 12 W. R. 1139 ; 34 L. J. Ch. 98 ; *Hillersden v. Grove*, 21 B. 518.

If the gift is subject to certain payments. *Parsons v. Saffery*, 9 Pr. 578.

On the other hand, the fact that prior legacies have been given to them, or that the bequest is to them as joint tenants, is against their right to the beneficial interest, though not alone conclusive. *Gibbs v. Rumsey*, 2 V. & B. 294 ; *Re*

*Henshaw, supra*; *Saltmarsh v. Barrett*, 3 D. F. & J. 279; Chap. XXVI.  
see *Buckle v. Bristow*, 13 W. R. 68.

And a direction that the executors are to retain their costs would, it seems, show that they were not to take beneficially. *Saltmarsh v. Barrett, supra*.

But a reimbursement clause, where there are continuing trusts, will not have this effect. *Romans v. Mitchell*, 15 W. R. 552.

So where there is no gift to the executors, a direction that they, their heirs, successors, representatives, or descendants may apply and distribute the same as to them may appear just, makes them trustees for the next of kin. *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; see *Barrs v. Fewkes*, 12 W. R. 666; 13 *ib.* 987; *Caruth v. Parker*, 11 L. R. Ir. 19.

## CHAPTER XXVII.

## GIFTS TO CHARITABLE USES.

## I. WHAT ARE CHARITABLE GIFTS.

**Chap. XXVII.**

General rules  
applicable to  
charitable  
gifts.

CHARITABLE gifts are subject to peculiar rules. The rule against perpetuity does not apply to them, nor if a charitable intent is once established can a charitable gift fail for uncertainty or want of a trustee.

On the other hand, the Court does not in cases where the Mortmain Act applies, marshal assets in favour of a charity, and charitable gifts are also subject to certain restrictions imposed by statute.

Legal meaning  
of charity.

Charity in the legal sense has a far wider meaning than the word conveys in its popular use. It is usual to refer to the preamble to the statute 43 Eliz. c. 4, as defining its meaning, but the word is by no means limited to the exact charities there referred to. *Commissioners for Special Purposes of Income Tax v. Pemsel*, (1891) A. C. 531.

The statute 43 Eliz. c. 4, has been repealed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42, s. 13), but the preamble to the earlier Act is recited in and recognised by sect. 13 (2) of the later Act.

Private  
charity—  
Benevolence,  
liberality,  
philanthropy.

It would be difficult, if not impossible, to give a satisfactory definition of charity, but it may be noted that while on the one hand a gift for private charity (*a*) is too confined to be a charity in the legal sense, and is therefore void; on the other hand, gifts for purposes of benevolence (*b*), or liberality (*c*), or general utility (*d*), or philanthropy (*e*), or for public purposes (*f*), are too wide to be charitable. *Ommaney v. Butcher*, T. & R. 260; see, however, *In re Sinclair's Trust*, 13 L. R.

Ir. 150 (a); *James v. Allen*, 3 Mer. 17; *In re Jarman's Estate*, Chap. XXVII. *Leavers v. Clayton*, 8 Ch. D. 584 (b); *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 522 (c); *Kendall v. Granger*, 5 B. 300 (d); *In re Macduff*; *Macduff v. Macduff*, (1896) 2 Ch. 451 (e); *Vezey v. Jamson*, 1 S. & St. 69 (f).

*A fortiori*, a gift to be expended in acts of hospitality is not charitable. *Re Hewitt*; *Mayor of Gateshead v. Hudspeth*, 49 L. T. 587; 53 L. J. Ch. 182.

It may, of course, appear from the will that the testator uses such words as benevolent or deserving in the sense of charitable, or that though he uses such words his main purpose is really charitable. See *Dolan v. Macdermott*, 3 Ch. 676; *In re Sutton*; *Stone v. A.-G.*, 28 Ch. D. 464; *Re Hewitt*; *Mayor of Gateshead v. Hudspeth*, 49 L. T. 587; 53 L. J. Ch. 182; *Lloyd-Greame v. A.-G.*, 10 T. L. R. 66.

The question whether there is a general charitable intent must be gathered from the whole will. General charitable intention.

Where there was a gift "to the following religious societies, namely," followed by a blank which was never filled in, the Court inferred a general charitable intention. *In re White*; *White v. White*, (1899) 2 Ch. 41; see *Biscoe v. Jackson*, 35 Ch. D. 460.

On the other hand, a gift to a corporation or to the trustees of a charity for a purpose which is never specified, affords no ground for inferring a charitable intent. *Corporation of Gloucester v. Wood*, 3 Ha. 131; 1 H. L. 272; *Aston v. Wood*, 6 Eq. 419. See *Doe d. Toone v. Copestake*, 6 East, 328.

Gifts for charitable purposes out of the jurisdiction of the Court are valid. *Re Geck*; *Freund v. Steward*, 69 L. T. 819. Charity out of jurisdiction.

It is said in *Pemsel's Case*, (1891) A. C. p. 588, that "Charity in its legal sense comprises four principal divisions: Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads." Classification of charitable gifts.

It is proposed for convenience to classify the cases with reference to these divisions.

**Chap. XXVII.** A. Trusts for the relief of poverty :—**A. Relief of poverty.**

Under this head come gifts for the poor inhabitants of a parish (*a*) ; for poor credible industrious persons residing at A. with two children or upwards or above fifty years of age, married or otherwise, unable to get a living (*b*) ; to let out land to the poor at a low rent (*c*) ; for poor pious persons, male and female (*d*) ; for six poor members of a chapel (*e*) ; for elderly persons in indigent or greatly reduced circumstances (*f*) ; for relieving distressed persons (*g*) ; for the redemption of British slaves in Turkey and Barbary (*h*) ; for pensioning off old and worn out clerks of the firm of Goslings and Sharpe (*i*). *A.-G. v. Clarke*, Amb. 422 (*a*) ; *Russell v. Kellett*, 3 Sm. & G. 264 (*b*) ; *Crafton v. Frith*, 15 Jur. 737 ; 20 L. J. Ch. 198 (*c*) ; *Nash v. Morley*, 5 B. 177 (*d*) ; *Gregory v. A.-G.*, 2 B. 366 (*e*) ; *Baldwin v. Baldwin*, 22 B. 413 (*f*) ; *Waldo v. Caley*, 16 Ves. 206 (*g*) ; *A.-G. v. Ironmongers' Company*, 2 B. 313 ; *A.-G. v. Gibson*, *ib.* 317, n. (*h*) ; *In re Gosling* ; *Gosling v. Smith*, 48 W. R. 300 (*i*).

**Endowment of hospital.**

A gift for endowing or erecting a hospital may come under this head. *Pelham v. Anderson*, 2 Ed. 296 ; 1 B. C. C. 444 ; *A.-G. v. Kell*, 2 B. 575.

**Relief of aged persons.**

The relief of aged, impotent and poor people is expressly referred to in the preamble to 43 Eliz. c. 4, but having regard to the fact that relief is mentioned and that poverty is coupled with age and impotence, it would seem that the aged person contemplated by the statute must be a person who is destitute and needs relief.

**Intention to relieve poverty inferred.**

In some cases, though poverty has not been expressly referred to, it has been inferred that the gift was intended to relieve destitution. On this ground, gifts for the widows and orphans of the parish of Lindfield (*a*) ; for the widows and children of the seamen of Liverpool (*b*) ; for twenty aged widows and spinsters of the parish of Peterborough (*c*) ; and annuities of 10*l.* for men and women not under fifty years of age, Unitarians, and who attend Lewin's Mead Unitarian Chapel in Bristol, with a direction to put up a tablet in the chapel, "otherwise how should the deserving know of it" (*d*), have been held charitable. *A.-G. v. Comber*, 2 S. & St. 93 (*a*) ;

*Powell v. A.-G.*, 3 Mer. 48 (b); *Thompson v. Corby*, 27 B. Chap. XXVII.  
649 (c); *In re Wall*; *Pomeroy v. Willway*, 42 Ch. D. 510 (d).

A friendly society existing for the purpose of providing, by subscriptions of its members, a fund to be distributed for their mutual benefit in case of sickness, lameness, or old age, or to provide annuities for widows of members, but without reference to poverty is not (a), while a similar society, if by its rules poverty is made a necessary element to entitle a member to the benefits of the society (b), is a charity. *In re Clark's Trust*, 1 Ch. D. 497; *Cunnack v. Edwards*, (1896) 2 Ch. 679 (a); *Spiller v. Maude*, 32 Ch. D. 158, n.; *Pease v. Pattinson*, 32 Ch. D. 154; *In re Buck*; *Bruty v. Mackey*, (1896) 2 Ch. 727; *In re Lacy*; *Royal General Theatrical Fund Association v. Kydd*, (1899) 2 Ch. 149 (b); see, too, *In re Amos*; *Carrier v. Price*, (1891) 3 Ch. 159 (a trades union).

A gift for the benefit of the poor does not include persons receiving parochial relief. *A.-G. v. Clarke*, Amb. 422; *A.-G. v. Price*, 3 Atk. 109; *Bishop of Hereford v. Adams*, 7 Ves. 324; *A.-G. v. Corporation of Exeter*, 2 Russ. 47; 3 *ib.* 396; *A.-G. v. Brandreth*, 1 Y. & C. C. 200; *A.-G. v. Wilkinson*, 1 B. 370; *A.-G. v. Borill*, 1 Ph. 762; *A.-G. v. Blizzard*, 21 B. 233; see *Re Ashton's Charity*, 27 B. 115.

A gift to the poorest of a class is charitable if the meaning is that it is to be for those actually poor. It is not charitable if it is merely a gift to the poorest of a wealthy class. *A.-G. v. Duke of Northumberland*, 7 Ch. D. 745; see *Liley v. Hey*, 1 Ha. 580.

In *Thomas v. Howell*, 18 Eq. 198, a gift of 200*l.* to each of ten poor clergymen, whether holding benefices or not, to be selected by A., was held not to be charitable. The gift was of a sum immediately payable, and moreover the word poor was used only in the sense of comparatively poor as a clergyman holding a benefice might be included. See also *A.-G. v. Baxter*, 1 Vern. 248; on appeal, *A.-G. v. Hughes*, 2 Vern. 105, where no question of charity seems to have arisen; see 7 Ves. 76.

On the question whether a gift to poor relations is charitable :—

1. When the gift is of a lump sum immediately distributable, the cases are very unsatisfactory.

Friendly society may or may not be a charity.

Persons receiving parochial relief.

*Thomas v. Howell.*

Gifts to poor relations.

1. Of a lump sum immediately distributable.

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*a.* In several cases it has been held that a gift to poor relations is to be confined to statutory next of kin, thus implying that the gift is not charitable, since, if it were, no question of uncertainty could have arisen. *Carr v. Bedford*, 2 Ch. Rep. 146; *Griffith v. Jones*, *ib.* 394, anno 1694; *Widmore v. Woodroffe*, Amb. 636.

On the other hand, relations were not so restricted in *A.-G. v. Buckland*, *cit.* Amb. 71; 1 Ves. Sen. 231; and *Mahon v. Savage*, 1 Sch. & Lef. 111.

In *Edge v. Salisbury*, Amb. 70; *S. C. nom. Goodinge v. Goodinge*, 1 Ves. Sen. 230; Belt, 128, where the words were "nearest relations," of course only next of kin could take.

*b.* In *Brunsdon v. Woolridge*, Amb. 507; 1 Dick. 380, where the will was dated in 1757, and was therefore since the Mortmain Act, a gift of *realty* to such poor relations as A. should think objects of charity, was held valid, and therefore not charitable; and see *Thomas v. Howell*, 18 Eq. 198.

**2. Of an annual sum.**

2. If, however, the gift is not of a sum distributable at once but of an annual sum, or if the testator has contemplated a perpetuity, the gift is charitable and not confined to statutory next of kin. *Isaac v. Defries*, Amb. 595; 17 Ves. 373, n.; *A.-G. v. Price*, 17 Ves. 371; *White v. White*, 7 Ves. 423; *Hall v. A.-G.*, 2 Jarman, 980; *Gillam v. Taylor*, 16 Eq. 581; some of the observations in the last case were criticised by Jessel, M.R., in *A.-G. v. Duke of Northumberland*, 7 Ch. D. 745.

**B. Advancement of education. Schools.**

**B. Trusts for the advancement of education :—**

The statute of Elizabeth refers to schools of learning without any reference to poverty, consequently all schools of learning are to be considered charities. *A.-G. v. Lonsdale*, 1 Sim. 105.

Under this head come gifts for the benefit, advancement and propagation of education and learning (by means of teaching) in every part of the world (*a*); for the advancement and propagation of education in economic and sanitary sciences in Great Britain (*b*); for the endowment or maintenance of two named schools (*c*); to found a school for the sons of gentlemen (*d*); to found prizes for essays on a given subject (*e*). *Whicker v. Hume*, 7 H. L. 124 (*a*); *Re Berridge*; *Berridge v. Turner*,



62 L. T. 365 ; 63 L. T. 470 (b) ; *Kirkbank v. Hudson*, 7 Pr. **Chap. XXVII.**  
213 (c) ; *A.-G. v. Lord Lonsdale*, 1 Sim. 105 (d) ; *Farrer v. St.*  
*Catharine's College*, 16 Eq. 19 (e).

Under this head also come gifts to institutions and societies which exist for the increase of knowledge generally, such as the British Museum (a) ; or the Smithsonian Institute (b) ; or for the advancement of science or some particular science, such as the Royal Society and the Geographical Society (c). *Trustees of the British Museum v. White*, 2 S. & St. 594 (a) ; *President of the United States v. Drummond*, cit. 7 H. L. 155 (b) ; *Beaumont v. Oliveira*, 4 Ch. 309 (c).

Gifts to  
scientific  
societies.

So the gift of a collection of pictures, china, and the like, to establish an art museum in Bath, is charitable. *Re Holburne* ; *Coates v. Mackillop*, 53 L. T. 212.

Art museum.

Gifts for promoting the kind treatment of animals come under this head.

Kindness to  
animals.

Thus, gifts to establish an institution for investigating, studying and endeavouring to cure maladies, distempers and injuries any quadrupeds or birds useful to man may be found subject to (a) ; to a society to promote prosecution for cruelty to animals (b) ; to a society for the protection of animals liable to vivisection and to the Home for Lost Dogs (c) ; and to societies for the suppression of vivisection (d), are all charitable. *University of London v. Yarrow*, 1 De G. & J 72 (a) ; *Re Vallance, Seton*, 5 Ed. 1141 (b) ; *In re Douglas* ; *Obert v. Barrow*, 35 Ch. D. 472 (c) ; *Armstrong v. Reeves*, 25 L. R. Ir. 325 ; *In re Forcaux* ; *Cross v. London Anti-Vivisection Society*, (1895) 2 Ch. 501 (d).

Gifts for the maintenance of particular animals are not charitable, but they are valid if they do not infringe the rules as to perpetuity. *In re Dean* ; *Cooper Dean v. Stevens*, 41 Ch. D. 552.

Gifts to promote the doctrines of a particular sect or of a particular person, if the doctrines are not of an immoral or irreligious tendency, may also be charitable.

Particular  
doctrines.

Thus, a gift for printing, publishing, and propagating the sacred writings of Joanna Southcote (a) ; a gift of 50*l.* a year to be paid to a worthy literary man who had not been very

**Chap. XXVII.** successful in his career, to assist in extending the knowledge of those doctrines in the various branches of literature to which the testator had turned his attention and pen (*b*); and a gift to a vegetarian society (*c*), have all been held good charitable gifts. *Thornton v. Howe*, 31 B. 14 (*a*); *Thompson v. Thompson*, 1 Coll. 395 (*b*); *Webb v. Oldfield*, (1898) 1 Ir. 431 (*c*).

A gift for the purchase of such books as may have a tendency to promote the interests of virtue and religion and the happiness of mankind, the same to be disposed of in Great Britain or in any other part of the British dominions, has been held not charitable. *Broune v. Yeall*, 7 Ves. 50, n.; see 10 Ves. 27; (1896) 2 Ch. 471.

Charity of this class must be of a public nature.

The limit of the conception of charity of this class appears to be that it must be of a public nature.

Thus, gifts to form a museum in Shakespeare's house, which was private property (*a*); to the Penzance Public Library, which was an institution existing only for the benefit and improvement of its subscribers (*b*); and to an Athenæum Mechanics' Institution, a club in which the members came together for literary purposes and mutual improvement (*c*), are not charitable. *Thomson v. Shakespear*, 1 D. F. & J. 399 (*a*); *Carne v. Long*, 2 D. F. & J. 75 (*b*); *Re Dutton*, 4 Ex. D. 54 (*c*); see also *Re Joy*; *Purday v. Johnson*, 60 L. T. 175.

C. Advancement of religion.  
Instances.

C. Trusts for the advancement of religion:—

Of this kind are gifts for the increase and improvement of Christian knowledge and promoting religion, and to buy Bibles and other religious books (*a*); to two clergymen to be applied for such purposes, having regard to the glory of God, in the spiritual welfare of His creatures as they should think fit (*b*); a gift to be applied in the service of my Lord and Master, and I trust Redeemer, or to the poor and the service of God (*c*); to certain named societies, and to any other religious institution or purposes (*d*); to General Booth for the spread of the Gospel (*e*); to maintain the missionary establishments among heathen nations of the Protestant Episcopal Church, commonly known as the Moravian Church (*f*); to a

religious institution for a religious purpose (g); for the furtherance of Conservative principles and religious and mutual improvement (h). *A.-G. v. Stepney*, 10 Ves. 22 (a); *Townsend v. Carus*, 3 Ha. 257 (b); *Powerscourt v. Powerscourt*, 1 Moll. 616; *Re Darling*; *Farquhar v. Darling*, (1896) 1 Ch. 50 (c); *Wilkinson v. Lindgren*, 5 Ch. 570 (d); *In re Lea*; *Lea v. Cooke*, 84 Ch. D. 528 (e); *Pemsel's Case*, (1891) A. C. 581 (f); *In re White*; *White v. White*, (1898) 2 Ch. 41 (g); *In re Scowcroft*; *Ormrod v. Wilkinson*, (1898) 2 Ch. 688 (h). Chap. XXVII.

Trusts for pious uses (a), and for missionary purposes (b), have been held not to be charitable. *Heath v. Chapman*, 2 Dr. 417 (a); *Scott v. Brownrigg*, 9 L. R. Ir. 246 (b).

A trust for the purchase of advowsons is not in itself charitable if no charitable trust is declared of the advowsons when purchased. *Hunter v. A.-G.*, (1899) A. C. 309.

Dissenters and Roman Catholics are, as regards bequests for charitable purposes, on the same footing as the Established Church. 1 W. & M. c. 18; 2 & 3 Will. IV. c. 115, s. 1; *A.-G. v. Pearson*, 3 Mer. 353, 405. Position of  
Dissenters  
and Roman  
Catholics.

Thus, bequests for the maintenance of Protestant Dissenters, or for the assistance of Unitarian congregations, or for the benefit of Irvingites, are valid. *A.-G. v. Pearson*, 3 Mer. 353; *Shrewsbury v. Hornby*, 5 Ha. 406; *A.-G. v. Lawes*, 8 Ha. 32. See *Dilworth v. Commissioners of Stamps*, (1899) A. C. 99. Dissenters.

So bequests to be applied to the use of Roman Catholic schools, or of Roman Catholic priests in and near London, or of a Roman Catholic college existing for the education of ecclesiastics and laymen, or to promote the Roman Catholic religion, or to assist in the completion of a Roman Catholic cathedral, are good. *Bradshaw v. Tasker*, 2 M. & K. 221; *A.-G. v. Gladstone*, 13 Sim. 7; *Walsh v. Gladstone*, 1 Ph. 290; *West v. Shuttleworth*, 2 M. & K. 684; *Dillon v. Reilly*, 1. R. 10 Eq. 152. Roman  
Catholics.

By 9 & 10 Vict. c. 59, s. 2, Jews are, in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith, subject Jews.

Chap. XXVII. to the same laws as Protestant subjects dissenting from the Church of England.

Since this statute, bequests to enable persons professing the Jewish religion to observe its rites, are valid. *Straus v. Goldsmid*, 8 Sim. 614; *In re Michel's Trusts*, 28 B. 39.

Monastic  
orders.

It has been held in Ireland that bequests in favour of Jesuits and members of other religious orders of the Church of Rome bound by monastic or religious vows, are void, as contravening the policy of 10 Geo. IV. c. 7 (see sects. 33—36). No doubt the same rule would be applied in England.

Thus bequests to be applied for the education and maintenance of priests of the order of St. Dominick in Ireland, and for the use of the Franciscan Convent at Wexford, and to the Christian Brothers at Cork, have been held to be void under the statute. *Sims v. Quinlan*, 16 Ir. Ch. 191; 17 Ir. Ch. 43; *Walsh v. Walsh*, 1. R. 4 Eq. 396; *Kehoe v. Wilson*, 7 L. R. Ir. 10; *Murphy v. Cheevers*, 17 L. R. Ir. 205.

The statute applies whether the monastic body is settled before or since the Act. *Liston v. Keegan*, 9 L. R. Ir. 531.

Societies consisting of females are exempted from the operation of the statute, see sect. 37.

Superstitious  
uses.

The statutes removing religious disabilities have not affected bequests to superstitious uses.

The statute of 1 Edw. VI. c. 14, relates only to certain superstitious uses then existing. The earlier statute, 23 Hen. VIII. c. 13, relates only to assurances of land to churches and chapels. But by analogy to these statutes certain bequests are considered void as being superstitious uses. *Cary v. Abbot*, 7 Ves. 490.

Bequests for  
masses.

Thus bequests to priests for offering masses for the souls of the dead are void, notwithstanding 2 & 3 Will. IV. c. 115, and go to the next of kin. *West v. Shuttleworth*, 2 M. & K. 684; *Heath v. Chapman*, 2 Dr. 417; *Re Blundell's Trusts*, 30 B. 360; *In re Fleetwood*; *Sidgreaves v. Brewer*, 49 L. J. Ch. 514; 15 Ch. D. 594.

They are void, although the legatee resides in a country where such a gift is good. *In re Elliott*; *Elliott v. Johnson*, 39 W. R. 297.

Land devised for a superstitious use goes to the heir. *Chap. XXVII.*  
*R. v. Portington*, 8 Salk. 334; *Crofts v. Eretts*, Moore, 784.

Bequests for offering up masses for the souls of the dead are not illegal in Ireland. *Commissioners of Charitable Donations v. Walsh*, 7 Ir. Eq. 34; *Read v. Hodgins*, *ib.* 17; *Brennan v. Brennan*, 1 R. 2 Eq. 321; *Phelan v. Slaterry*, 19 L. R. Ir. 177; *Bradshaw v. Jackman*, 21 L. R. Ir. 12.

Bequests for masses in Ireland.

Such bequests, however, though not illegal in Ireland, are not charitable, and are void if they tend to a perpetuity. *Dillon v. Reilly*, 1 R. 10 Eq. 152; *A.-G. v. Delaney*, 1 R. 10 C. L. 104; *Morrow v. M'Conville*, 11 L. R. Ir. 236; *Dorrian v. Gilmore*, 15 L. R. Ir. 69; *Reichenbach v. Quin*, 21 L. R. Ir. 138; *Small v. Torley*, 25 L. R. Ir. 388.

But a gift for the public celebration of the mass, though it be for the repose of the testator's soul, is a good charitable gift. *A.-G. v. Hall*, (1896) 2 Ir. 291; (1897) 2 Ir. 426; overruling *Kehoe v. Wilson*, 7 L. R. Ir. 10; *Perry v. Tuomey*, 21 L. R. Ir. 480; *Brannigan v. Murphy*, (1896) 1 Ir. 418.

By the Roman Catholic Charities Act (23 & 24 Vict. c. 134), sect. 1, it is in effect provided, that dispositions of real or personal estate upon any lawful charitable trust in favour of Roman Catholics shall not be invalidated by reason that the same estate is subjected to a trust deemed to be superstitious, but the property may be apportioned, and a portion applied to the lawful charitable trusts declared by the donor, and the rest applied to charitable purposes for the benefit of Roman Catholics as the Court or the Charity Commissioners may think just.

As to the application of the doctrine of superstitious uses to British Colonies, see *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381, and the authorities there quoted.

The statute of Elizabeth expressly mentions the repair of churches.

Thus, gifts to repair the fabric of a church, or even the ornaments within it, such as a monument or tomb, or the parish churchyard and the tombs in it, are charitable. *Hoare v. Osborne*, L. R. 1 Eq. 585; *In re Vaughan*; *Vaughan v. Thomas*, 33 Ch. D. 187.

Repair of a church.

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Gift to build  
or repair a  
tomb is not a  
charity.

But a gift to build or repair the tomb of the testator or his family, not within a church, is not charitable. *Mellick v. President of the Asylum*, Jac. 180; *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Adnam v. Cole*, 6 B. 353; *Rickard v. Robson*, 31 B. 244; *Hoare v. Osborne*, L. R. 1 Eq. 585.

Nor is such a gift within the statute 43 Geo. III. c. 108. *Re Rigley's Trust*, 15 W. R. 190; 36 L. J. Ch. 147.

Such a gift, therefore, if it involves a perpetuity, is void. *Rickard v. Robson*, *supra*; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *In re Vaughan*; *Vaughan v. Thomas*, 33 Ch. D. 187. See *In re Tyler*; *Tyler v. Tyler*, (1891) 3 Ch. 252.

Limit of  
conception of  
charity of this  
class.

The limit of the conception of charity in this direction appears to be that the religious purpose must be something more than mere personal edification. It must be in some way directed to the public good.

Thus, though a gift to a voluntary society established for the personal sanctification of its members, who, as a means thereto, employ themselves in the exercise of works of piety and charity, is a good charitable gift; a gift to a similar society existing only for the spiritual improvement of its members is not. *Cocks v. Manners*, 12 Eq. 574; *Morrow v. M'Conville*, 11 L. R. Ir. 236; *Mahony v. Duggan*, *ib.* 260; *In re Wilkinson's Trusts*, 19 L. R. Ir. 531.

A gift of 100*l.* to the Christian Brethren in trust of A. and B., who were both members of that community, was held a good charitable gift. The Christian or Plymouth Brethren were a large body of persons in different parts of the kingdom, and the Court came to the conclusion that it was a gift to trustees in trust for the Brethren, and not a gift to the Brethren as individuals. *In re Brown*; *Paden v. Finlay*, (1898) 1 Ir. 423.

D. Purposes  
beneficial to  
the community.

Gifts to benefit  
a district.

D. Trusts for other purposes beneficial to the community not falling under any of the preceding heads:—

Under this head come, first, gifts for the benefit of a particular defined district, such as a parish, a town, or county.

Of this kind are a gift (upon failure of a particular charitable purpose) for some other purpose conducing to the good of the county of Westmoreland and the parish of Lowther especially (a); gifts or trusts for the benefit of a parish (b);

a trust of an advowson for the benefit of a parish (c); gifts for the purpose of bringing spring-water from St. Arvan's or elsewhere to the town of Chepstow for the use of the inhabitants for ever (d); a gift for the improvement of the city of Bath and of the town of Bolton (e); or for the benefit and ornament of the town of Faversham (f); a gift to the corporation of Shrewsbury to be applied in the reparation of the bridges and walls (g). *A.-G. v. Lonsdale*, 1 Sim. 105 (a); *A.-G. v. Lord Hotham*, T. & R. 209; *A.-G. v. Webster*, 20 Eq. 488; *In re St. Botolph Without Bishopsgate Parish Estates*, 35 Ch. D. 142 (b); *In re St. Stephen, Coleman Street*, 39 Ch. D. 492 (c); *Jones v. Williams*, Amb. 651 (d); *Howse v. Chapman*, 4 Ves. 542; *A.-G. v. Heelis*, 2 S. & St. 67 (e); *Mayor of Faversham v. Ryder*, 5 D. M. & G. 350 (f); *A.-G. v. Corporation of Shrewsbury*, 6 B. 220 (g).

Secondly, trusts for fluctuating bodies of persons defined by some reference to tenure or residence or occupation; for instance, a trust of a right for the free inhabitants of ancient tenements in a borough to dredge for oysters during a limited period and to carry them away without stint for sale or otherwise (a); a trust for the benefit of copyhold tenants for the repair of the sea-dykes within the manor (b); a trust for the benefit of the occupiers of all such cottages and tenements containing less than one acre each as were erected on ancient sites or had then been erected more than fourteen years (c); and a trust for the freemen for the time being of the city of Norwich (d). *Mayor of Saltash v. Goodman*, 7 A. C. 683 (a); *Wilson v. Barnes*, 38 Ch. D. 507 (b); *In re Christchurch Inclosure Act*, 38 Ch. D. 520 (c); *In re Norwich Town Close Estate Charity*, 40 Ch. D. 298 (d).

Thirdly, gifts in aid of the public burdens, such as parochial rates or Imperial taxation.

Of this kind are gifts to the churchwardens in aid of the poor's rate (a); to his Majesty's Government in exoneration of the National Debt (b); to the Government of Bengal, to be applied to charitable, beneficial, and public works at and in the city of Dacca, for the benefit of the native inhabitants (c); a gift in exoneration of a tax affecting the commonalty of Grantham (d);

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Trusts for fluctuating bodies.

Gifts in aid of public burdens

**Chap. XXVII.** a gift to the Chancellor of the Exchequer for the advancement of Great Britain (c). *Doe v. Howell*, 2 B. & Ad. 744 ; see *A.-G. v. Blizard*, 21 B. 233 (a) ; *Newland v. A.-G.*, 3 Mer. 684 (b) ; *Mitford v. Reynolds*, 1 Ph. 185 (c) ; *A.-G. v. Bushby*, 24 B. 299 (d) ; *Nightingale v. Goulbourne*, 5 Ha. 484 ; 2 Ph. 594 (e).

To encourage  
good servants.  
Volunteer  
corps.

Fourthly, under this head may also be mentioned a gift for the increase and encouragement of good servants (a), and for the benefit of a volunteer corps (b). *Loscombe v. Wintringham*, 13 B. 87 (a) ; *In re Lord Stratheden and Campbell* ; *Alt v. Lord Stratheden and Campbell*, (1894) 3 Ch. 265 (b).

Gift to  
encourage  
sport.

The limit of the legal conception of charity in this direction is that the gift must not be to encourage a mere sport, such as yacht racing. *In re Nottage* ; *Jones v. Palmer*, (1895) 2 Ch. 649.

Gift contrary  
to public  
policy.

And it must not be contrary to public policy. Thus, a gift to purchase the discharge of poachers committed for non-payment of fines, fees, or expenses under the Game Laws (a) is void ; and a gift towards the political restoration of the Jews to Jerusalem and to their own land was also held void, as being inconsistent with our own amicable relations with the Sublime Porte (b). *Thrupp v. Collett*, 26 B. 125 (a) ; *Habershon v. Vardon*, 4 De G. & S. 467 (b).

It would also seem that the class to be benefited must be some well-defined branch of the community and not a merely artificial class created by the testator. Thus, a grant of land to the Roman Catholic clergyman entrusted with spiritual care of the Roman Catholic inhabitants of the parish of R., for the purpose of having the rents applied for the benefit of the children under the age of twelve of the tenantry of the grantor, was held not to be a charity. *Browne v. King*, 17 L. R. Ir. 448. See, too, *Re Tunno* ; *Raikes v. Raikes*, W. N. 1886, 154, a gift to build six labourers' cottages on an estate.

## II. GIFTS IN RESPECT OF AN OFFICE.

Gifts in  
respect of an  
office.

In some cases the question arises whether a bequest is given in respect of a certain office, and is therefore charitable, or whether the office is merely used to describe the person.



Thus, a gift to A., minister of a certain church, is not charitable. *Doe d. Phillips v. Aldridge*, 4 T. R. 264; *Donnellan v. O'Neill*, I. R. 5 Eq. 523. Chap. XXVII.

But a gift to A., minister of a chapel, and his successors for ever, is charitable. *Thornber v. Wilson*, 3 Dr. 245; see *Robb v. Bp. Dorian*, I. R. 9 C. L. 488; *ib.* 11 C. L. 292; *Gibson v. Representative Church Body*, 9 L. R. Ir. 1.

### III. THE DOCTRINE OF CY PRÈS.

If the testator expresses a general charitable intention the bequest will not fail:—

General  
charitable  
intention  
carried out.

a. By the failure of the testator to appoint the particular objects he intends to benefit, though the bequest may be to such charitable uses as he shall appoint. *Mills v. Farmer*, 1 Mer. 55; *Commissioners of Charitable Donations v. Sullivan*, 1 D. & War. 501; *Gillan v. Gillan*, 1 L. R. Ir. 114; *Pocock v. A.-G.*, 3 Ch. D. 342.

b. By the death, revocation of the appointment, or refusal to act of persons, to whom the testator has given power to apply his property for charitable purposes. *Moggridge v. Thackwell*, 7 Ves. 36; 18 Ves. 416; *White v. White*, 1 B. C. C. 12; *A.-G. v. Boulbee*, 2 Ves. Jun. 380; 3 Ves. 220.

c. By the failure or non-existence of the particular objects he has pointed out. *Loscombe v. Wintringham*, 13 B. 87; *Hayter v. Trego*, 5 Russ. 113; *Reeve v. A.-G.*, 3 Ha. 191; *Biscoe v. Jackson*, 35 Ch. D. 460.

d. By the fact that some of the objects specified are void. *Fisk v. A.-G.*, 4 Eq. 521; *Dawson v. Small*, 18 Eq. 114.

e. By the fact that the bequest is to be applied to a particular object at a future time beyond the limits of perpetuity. *Chamberlayne v. Brockett*, 8 Ch. 206.

In such cases the fund does not fall into residue, but the Court carries out the general charitable intention *cy près*, and directs a scheme for that purpose. Doctrine of  
*cy près*.

And a gift to a particular charity which is capable of taking effect at the testator's death does not fail by the subsequent

**Chap. XXVII.** failure of the charitable object, but the fund will be applied *cy près* by a scheme. *Hayter v. Trego*, 5 Russ. 118; *In re Slevin*; *Slevin v. Hepburn*, (1891) 2 Ch. 236; *In re Buck*; *Bruty v. Mackey*, (1896) 2 Ch. 727; *Re Villers-Wilkes*; *Bower v. Goodman*, 72 L. T. 323; see *A.-G. v. Day*, (1900) 1 Ch. 31.

The doctrine of *cy près* will be applied to a particular charitable gift which becomes incapable of taking effect though the residue is also given to charity. *Mayor of Lyons v. Advocate-General of Bengal*, 1 App. C. 91.

Limits of the doctrine of *cy près*.

Gift to a particular charitable society may fail by lapse.

The doctrine does not, however, apply in the following cases:—

1. If there is a gift to a particular charitable society by name, and the society has existed, but at the time of the testator's death has ceased to exist, the legacy fails. *Clark v. Taylor*, 1 Dr. 642; *Marsh v. Means*, 3 Jur. N. S. 790; *Russell v. Kellett*, 3 Sm. & G. 264; *Langford v. Gowland*, 3 Giff. 617; *Fisk v. A.-G.*, 4 Eq. 521; *Makeown v. Ardagh*, 1 R. 10 Eq. 445; *In re Orey*; *Broadbent v. Barrow*, 29 Ch. D. 560; *Re Joy*; *Purday v. Johnson*, 60 L. T. 175; *In re Rymer*; *Rymer v. Stanfield*, (1895) 1 Ch. 19.

General charitable intention.

If the bequest to the society is expressed to be for a charitable object, the failure of the trustee will not destroy the charitable gift. *Templemoyle School*, 1 R. 4 Eq. 295; *Carbery v. Cox*, 3 Ir. Ch. 231; *Marsh v. A.-G.*, 2 J. & H. 61.

Uncertainty as to society meant.

If there is no existing charitable society sufficiently, or there are several equally, answering the description, the gift will not be void, but will be applied *cy près* to charitable purposes, or be divided among the several claimants. The approval of the Attorney-General is required. *Simon v. Barber*, 5 Russ. 112; *Re Clergy Society*, 2 K. & J. 615; *Loscombe v. Wintringham*, 13 B. 87; *Re Maguire*, 9 Eq. 632; *Re Alchin's Trusts*, 14 Eq. 230.

Gift for a definite charitable object fails if the object is impossible.

2. A gift for a clearly-defined and particular charitable object, as to build a church in a particular place, will fail if the object becomes impossible. *A.-G. v. Bishop of Oxford*, 1 B. C. C. 444, n.; *Cherry v. Mott*, 1 M. & C. 123; *Russell v. Kellett*, 3 Sm. & G. 264; *Hoare v. Hoare*, 56 L. T. 147; see, however, as to the limits of this doctrine, *A.-G. v. Bowyer*, 3 Ves. 724; *Abbott v. Fraser*, L. R. 6 P. C. 96; *Biscoe v.*

*Jackson*, 35 Ch. D. 460; *Re Taylor*; *Martin v. Freeman*, Chap. XXVII. 58 L. T. 538.

In such a case it seems the Court will retain the fund for a time and direct an inquiry as to the possibility of carrying out the bequest. *A.-G. v. Bishop of Chester*, 1 B. C. C. 444; *Baldwin v. Baldwin*, 22 B. 419; *Sinnett v. Herbert*, 7 Ch. 232; *Chamberlayne v. Brockett*, 8 Ch. 206; see, too, *Abbott v. Fraser*, L. R. 6 P. C. 96.

The Court will direct an inquiry as to the possibility of effecting the object.

Though, on the other hand, if the gift to the charity is expressly made upon some event which is too remote, the gift would be void: as, for instance, a gift of a sum of money to build almshouses, when land should be given. *Chamberlayne v. Brockett*, 8 Ch. 206; *In re White's Trusts*, 33 Ch. D. 449; *In re Lord Stratheden and Campbell*; *Alt v. Lord Stratheden and Campbell*, (1894) 3 Ch. 265; and see p. 519.

Gift to charity upon an event too remote is void.

The question as regards remoteness is whether the property is at once devoted to charity, the actual application being postponed from the necessities of the case. See *Biscoe v. Jackson*, 35 Ch. D. 460; *Re Gyde*; *Ward v. Little*, 79 L. T. 261.

3. Where a discretion is left to trustees, which would empower them to apply the whole of the gift either to charitable or other indefinite purposes, the whole gift is void, as it does not appear that the chief object was charity; and, on the other hand, the other object is void for uncertainty. *Williams v. Kershaw*, 5 L. J. Ch. 84; 5 Cl. & F. 111; *James v. Allen*, 3 Mer. 17; *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 521; *Ommaney v. Butcher*, T. & R. 260; *Vezey v. Jamson*, 1 S. & St. 69; *Kendall v. Granger*, 5 B. 300; *Thompson v. Thompson*, 1 Coll. 398; *Down v. Worrall*, 1 M. & K. 561; *Boyle v. Boyle*, 1 R. 11 Eq. 498; *In re Hewitt's Estate*; *Mayor of Gateshead v. Hudspeth*, 49 L. T. 587; 53 L. J. Ch. 132; *Hunter v. A.-G.*, (1899) A. C. 309; see *In re Sutton*; *Stone v. A.-G.*, 28 Ch. D. 464.

Discretion to trustees to apply the whole to charity or other indefinite objects.

The trustees cannot exercise their discretion and appoint the whole to charity. *In re Jarman's Estate*; *Leavers v. Clayton*, 8 Ch. D. 584.

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Discretion to apportion to charity and other ascertainable objects.

If the trustees have a discretion to apportion between charitable objects and definite ascertainable objects non-charitable, the trust does not fail, but in default of apportionment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally. *A.-G. v. Doyley*, 4 Vin. 485 ; 7 Ves. 58, n. ; *Salisbury v. Denton*, 3 K. & J. 529 ; *Crafton v. Frith*, 20 L. J. Ch. 198 ; *Hunter v. A.-G.*, (1899) A. C. 309 ; see, too, *Re Hall's Charity*, 14 B. 115 ; *In re Douglas* ; *Obert v. Barrow*, 35 Ch. D. 472.

Gift for a particular purpose where amount uncertain—gift of surplus void.

4. When a fund is given for a particular purpose and the surplus is given to charity, then, if the primary purpose fails and it cannot be ascertained how much ought to have been expended on it, the gift of the surplus fails also. In most of the cases under this head the primary purpose was one involving a substantial outlay, and the surplus was contemplated as being of small amount, and the testator could not have intended the whole fund to go to the charitable purpose if the primary purpose should fail.

For instance, where there was a direction to build a chapel, but with no clue as to the kind of chapel intended, and if any surplus should remain from the purchasing or building the chapel it was given to a charitable object, the gift to build the chapel being void, it was held that the Court could not ascertain what ought to have been spent on it, and consequently the whole gift failed. *Chapman v. Brown*, 6 Ves. 404 ; *A.-G. v. Hinxman*, 2 J. & W. 270 ; *Limbrey v. Gurr*, 6 Mad. 151 ; *Cramp v. Playfoot*, 4 K. & J. 479 ; *Fowler v. Fowler*, 33 B. 616 ; *Kirkmann v. Lewis*, 38 L. J. Ch. 570 ; *Re Taylor* ; *Martin v. Freeman*, 58 L. T. 538.

On the other hand, if the primary object is sufficiently definite to enable the Court to ascertain what should be spent on it it will do so, and the gift of the surplus will be valid. Cases *supra* ; and see *Mitford v. Reynolds*, 1 Ph. 185 ; 16 Sim. 105 ; *Magistrates of Dundee v. Morris*, 3 Macq. 134 ; 6 W. R. 556.

Fund to be applied to several objects—some void.

5. If a fund is to be applied to several objects, some valid and some invalid, the Court will, if possible, ascertain by inquiry how much should be applied to each object (a). If it

comes to the conclusion that an inquiry would not lead to a satisfactory result, the fund will be equally divided between the objects, at any rate, if they are of a similar kind; for instance, the repair of a vault not in a church, and of a window and monument in a church (*b*). *Adnam v. Cole*, 6 B. 353; *In re Rigley's Trusts*, 36 L. J. Ch. 147; *Champney v. Davy*, 11 Ch. D. 949; *In re Vaughan*; *Vaughan v. Thomas*, 33 Ch. D. 187 (*a*); *Hoare v. Osborne*, L. R. 1 Eq. 585 (*b*).

6. In some cases, where a fund was given upon trust to apply so much as might be necessary in repairing a tomb and the rest was then given to a charitable purpose, and the gift for repair of the tomb was void, it has been held that the whole fund was applicable for the charitable purpose. The intention in those cases was that whatsoever was not wanted for the primary purpose should go to charity. *Fisk v. A.-G.*, 4 Eq. 521; *Dawson v. Small*, 18 Eq. 114; *In re Williams*, 5 Ch. D. 735; *In re Birkett*, 9 Ch. D. 576; *In re Vaughan*; *Vaughan v. Thomas*, 33 Ch. D. 187.

Gift of residue to charity may pass fund given to invalid object.

7.. Where a bequest is void as contravening the policy of a statute, it will not be carried out *cy près*. *Thrupp v. Collett*, 26 B. 125; *Sims v. Quinlan*, 16 Ir. Ch. 191; 17 *ib.* 43; *Walsh v. Walsh*, I. R. 4 Eq. 397.

Gift contrary to policy of a statute.

8. Where the whole of the rents and profits of land are given to charity, but the objects pointed out do not exhaust the fund, the Court distributes the surplus *cy près*. *Arnold v. A.-G.*, Shower P. C. 22; *Pieschel v. Paris*, 2 S. & St. 384.

Increase in value of rents and profits given to charity.

Where a sum, which in fact amounts to the whole of the rents and profits of certain land, is given to charity, this is in effect a dedication to charity of the land itself, and any increase in the rents and profits goes to the same purposes. *Thetford School Case*, 8 Rep. 130b.

Whole rent given to charity, the increase also passes.

Similarly, if the testator has shown an intention to dispose of the whole to charitable purposes, though there may be a residue undisposed of, it will go to the same purposes. *A.-G. v. Drapers*, 2B. 508.

And where the whole rents are given in certain proportions among several charitable objects, any increase is apportioned rateably among those objects, subject to the discretion of the

Chap. XXVII. Court. *A.-G. v. Jesus Coll.*, 29 B. 163; *A.-G. v. Marchant*, L. R. 3 Eq. 424; *Merchant Taylors v. A.-G.*, 11 Eq. 35; 6 Ch. 513; *A.-G. v. Wax Chandlers*, L. R. 6 H. L. 1.

When certain payments are directed out of the rents for charitable objects, leaving a surplus, the increase does not pass to the charitable objects.

But where rents and profits of land are given to a corporation and certain fixed charitable payments are directed, which do not exhaust the whole, and there is no gift of the residue, the residue belongs to the corporation. *A.-G. v. Mayor of Bristol*, 2 J. & W. 291; *A.-G. v. Brasenose Coll.*, 2 Cl. & F. 295; *A.-G. v. Trinity College*, 24 B. 383.

*A fortiori*, if the surplus is expressly given to the corporation, though the amount of it be specifically mentioned by the testator, any increase, after the payments directed have been made, belongs to the corporation. *Southmolton v. A.-G.*, 5 H. L. 1; *Mayor of Beverley v. A.-G.*, 6 H. L. 310; *A.-G. v. Dean of Windsor*, 8 H. L. 369.

If, among the particular payments directed, some are not charitable, but are to be made to individuals and cannot have been intended to abate, there is an additional argument that none of the particular payments were either to abate or to increase, and that the surplus, whatever it might be, was to go to the donees in trust. *A.-G. v. Cordwainers*, 3 M. & K. 534; *Mayor of Beverley v. A.-G.*, 6 H. L. 310.

On the other hand, if the surplus undisposed of is insignificant, and there is a direction, that the particular payments are to abate proportionately in the event of depreciation of the property, the inference arises, that they were in like manner to share proportionally in any increase. *Mercer's Co. v. A.-G.*, 2 Bl. N. S. 165.

#### IV. ADMINISTRATION OF CHARITABLE GIFTS.

Administration under sign manual.

Where the gift is for general charitable purposes without the intervention of a trustee it must be administered under the authority of the Crown, to be obtained by letters missive under the sign manual. *Da Costa v. De Pas*, Amb. 227; *A.-G. v. Herrick*, *ib.* 712; *Kane v. Cosgrave*, 1 R. 10 Eq. 211; see *Felan v. Russell*, 4 Ir. Eq. 701.

Where the gift is to trustees for charitable purposes, whether special or general, the Court will, if necessary, administer the fund by means of a scheme. *Moggridge v. Thackwell*, 7 Ves. 36; *Paice v. Archbishop of Canterbury*, 14 Ves. 364. Chap. XXVII.  
Administration  
by means of  
scheme.

But though the Court has discretion in such cases to settle a scheme, yet, if the trustees are proper persons, and are willing to act, it will allow them to receive and administer the fund, more especially in cases where a discretion is conferred upon them. *Society for P. G. v. A.-G.*, 3 Russ. 142; *In re Lea*; *Lea v. Cooke*, 34 Ch. D. 528; *Warren v. Clancy*, (1898) 1 Ir. 127; see *Wellbeloved v. Jones*, 1 S. & St. 43; *Corpn. of Sons of Clergy v. Mose*, 9 Sim. 610. Discretion of  
trustees not  
interfered  
with.

And if an annual sum is given to a person for his life to be distributed in charity the Court will not interfere with the discretion of the trustee by settling a scheme. *Bennett v. Honeywood*, Amb. 708; *Waldo v. Caley*, 16 Ves. 206; *Horde v. Earl of Suffolk*, 2 M. & K. 59. Distribution  
of annual sum,

Where a sum is given to a charitable institution for the purposes of the institution, the fund will be paid over without a scheme, and the fund may be paid to the institution, even where the gift is to a trustee, with a discretion to apply the same for the benefit of the institution, and the trustee dies before the testator. *Walsh v. Gladstone*, 1 Ph. 290; *In bonis McAuliffe*, 44 W. R. 304. Payment to  
charitable  
institution.

In the case of a gift to foreign trustees for charitable purposes, the fund will be handed over to the foreign trustees to be administered by them, though the Court here has no control over them. *Re Geck*; *Freund v. Steward*, 69 L. T. 819; see *Re Davis's Trusts*, 61 L. T. 430. Gift to foreign  
trustees for  
charity.

If the foreign trustees disclaim, the Court has no power to settle a scheme, and the gift fails. *A.-G. v. Sturge*, 19 B. 597; *New v. Bonaker*, 4 Eq. 655.

Where a fund was given for the benefit of the blind in Inverness-shire, and the surviving executor declined to act, the Court gave liberty to the Attorney-General to apply to the Court of Session for a scheme. *In re Fraser*; *Yeates v. Fraser*, 22 Ch. D. 827.

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Fund when  
retained in  
Court.

Where a testatrix gave a sum to endow a church, subject to certain conditions as to the services, the Court held the conditions to be continuing and retained the fund in Court, paying the income to the incumbent so long as he performed the conditions. *In re Robinson ; Wright v. Tugwell*, (1892) 1 Ch. 95.

### V. RESTRICTIONS ON GIFTS TO CHARITY.

Mortmain and  
Charitable  
Uses Act,  
1891.

Before the passing of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), land and impure personalty could not be given by will to charity.

But the law has been altered by that Act, which applies only to testators dying after the passing of the Act (the 5th August, 1891) ; and does not extend to Scotland or Ireland.

The Act provides (sect. 3) that land in the Mortmain and Charitable Uses Act, 1888, and in this Act shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land.

Sect. 5 provides that land may be given by will to or for the benefit of any charitable use, but such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at Chambers, or by the Charity Commissioners.

Sect. 6 provides for the sale of the land under order of the Charity Commissioners if not sold within the appointed time.

Sect. 7 provides that any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land.

Sect. 8 gives power to the Court and the Charity Commissioners to sanction the retention or acquisition of land in certain cases.



Where a testator by will made before but coming into operation after the passing of the Act gave his residue upon trust to pay "such part of my said residuary trust estate which by law may be given for charitable purposes" to a charity, it was held that the whole residue passed under the gift. *In re Bridger; Brompton Hospital for Consumption v. Lewis*, (1898) 1 Ch. 44; (1894) 1 Ch. 297.

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The Act applies to gifts in remainder, as a future interest in land may be sold under the Act. *In re Hume; Forbes v. Hume*, (1895) 1 Ch. 422.

Cases to which the Act does not apply are governed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), which repealed and substantially re-enacted the Statute of Mortmain (9 Geo. II. c. 36).

Act of 1888.

The Act of 1888, sect. 13 (1) provides in effect that the repeal of the Act 9 Geo. II. c. 36, shall not affect the past operation of that enactment, or any instrument executed before the passing of the Act.

It may, therefore, still be necessary to consider the Act of 9 Geo. II. c. 36, as regards testators who died before the 13th August, 1888, and possibly also as regards testators who died after that date but made their wills before it.

The cases decided under the old law are therefore retained.

If a charitable legacy was given free of duty, this was in effect a gift of the duty, which could not therefore be paid out of impure personalty. *Wilkinson v. Barber*, 14 Eq. 96.

Legacy duty.

A. The decisions are numerous as to what is an interest in land within the Statute of Mortmain.

What is an interest in land within the statute  
Investment by trustees in realty under power not material.

1. The testator's death is the time to ascertain the pure personalty. Where a gift is made to a charity at a future time and power is given to the trustees by the will to invest in real security, this does not alter the character of the pure personalty, nor does an actual investment by the trustees in real security have that effect. *Curtis v. Hutton*, 14 Ves. 537, 539; *In re Hamilton; Cadogan v. Fitzroy*, (1896) 2 Ch. 617.

But under a gift after a life interest of so much of the estate as is then invested upon securities which can be given

Reference to estate as found at a future date.

Chap. XXVII. to charity, money invested by the trustees on mortgage will not pass. *Re Corcoran*; *Corcoran v. Riddell*, 67 L. T. 754.

Money to  
arise from  
sale of land.

2. Money to arise from the sale of land directed by the testator, though the land is devoted to partnership purposes, is within the statute. *Page v. Leapingwell*, 18 Ves. 463; *British Museum v. White*, 2 S. & St. 594; *Thorbyer v. Wilson*, 4 Dr. 350; *Incorporated Church Building Society v. Coles*, 5 D. M. & G. 324; *Ashworth v. Munn*, 28 W. R. 965; 47 L. J. Ch. 747; 15 Ch. D. 563.

Lien for  
purchase-  
money.

So is the purchase-money for land contracted to be sold by the testator, but in respect of which he has a lien at his death, and also a premium payable to the testator in respect of a lease granted at a low rent. *Harrison v. Harrison*, 1 R. & M. 71; *Shepherd v. Beetham*, 6 Ch. D. 597.

Money to  
arise from  
sale of land  
under a prior  
testator's will.

3. On the question whether money to arise from the sale of land under an instrument other than the testator's will is within the Act, the cases are not entirely satisfactory.

Where land is given by a first testator on trust for sale, a gift of the proceeds by the will of a second testator is within the Act if the time for selling the land has not arrived at the death of the second testator, or if the land has not in fact been sold, and the second testator might have elected to take it as land. *Brook v. Badley*, 4 Eq. 106; 3 Ch. 672; *Lucas v. Jones*, 4 Eq. 73; *A.-G. v. Harley*, 5 Mad. 321.

Where land is given by a first testator on trust for sale and division among several persons, a gift of the proceeds by the will of a second testator, which does not take effect till after the death of the first, is it seems within the Act, if the property has not in fact been sold before the second testator's death. *Marsh v. A.-G.*, 2 J. & H. 61, is overruled by *Brook v. Badley*, 3 Ch. 672; see *Ashworth v. Munn*, 15 Ch. D. 563.

The case has been held not within the Act, where leaseholds have been given on trust for sale to pay debts, and have been sold by the executors, in course of administration, after the death of the second testator, though the pure personalty was enough to satisfy the debts. *Shadbolt v. Thornton*, 17 Sim. 49; 13 Jur. 597; but this case is of very doubtful

authority. See *Lucas v. Jones*, *supra*; *Aspinall v. Bourne*, Chap. XXVII. 29 B. 462.

4. Further, within the Act are the proceeds of growing crops (a), leaseholds (b), money secured by mortgage of land (c), or charged upon land (d), including equitable mortgages (e), and mortgages of leaseholds (f). *Symonds v. Marine Society*, 2 Giff. 325 (a); *Johnston v. Swann*, 3 Mad. 457; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Entwistle v. Daris*, 4 Eq. 272 (b); *White v. Evans*, 4 Ves. 21; *Corbyn v. French*, 4 Ves. 418; *Currie v. Pye*, 17 Ves. 462; *Paice v. Archbishop of Canterbury*, 14 Ves. 364 (c); *A.-G. v. Harley*, 5 Mad. 321; *Harrison v. Harrison*, 1 R. & M. 71 (d); *Alexander v. Brame*, 30 B. 153 (e); *Chester v. Chester*, 12 Eq. 444 (f).

Crops,  
leaseholds.  
Mortgages and  
charges.

Money secured by mortgage of a life interest in a fund invested on mortgage of land is not, but money secured by mortgage of the life interest and reversion in such a fund is within the Act, as in the latter case the mortgagee could by foreclosure make himself the owner of the security upon which the fund is invested. *In re Watts*; *Cornford v. Elliott*, 27 Ch. D. 319; 29 Ch. D. 947.

5. Though personalty may happen to be included in a mortgage given by will, the bequest will not be apportioned, nor will there be an apportionment, if the bequest is of a sum charged upon realty and personalty by a prior testator. *Brook v. Badley*, L. R. 3 Ch. 672; see *In re Hill's Trusts*, 16 Ch. D. 173; *In re Watts*; *Cornford v. Elliott*, *supra*.

Mortgage of  
real and  
personal  
property.

But if a sum is secured by a promissory note and a mortgage by deposit, and the property mortgaged is worth only half the debt, the bequest is valid as regards the portion not secured by the mortgage. *Smith v. Sopwith*, W. N. 1877, 208.

6. Within the statute are arrears of interest due on a mortgage, and rent accrued due since the testator's death on land contracted to be sold, and a judgment debt, if it is a charge upon realty. *Alexander v. Brame*, 30 B. 153; *Edwards v. Hall*, 11 Ha. 1; *Collinson v. Pater*, 2 R. & M. 344.

Arrears of  
rent, judgment  
charged on  
land.

7. A voluntary covenant to leave money by will to a charity is in substance a legacy, and is void if the testator leaves only real assets; if he leaves mixed assets, there will be an

Voluntary  
covenant to  
leave money  
is void as

**Chap. XXVII.** abatement in the proportion of the pure to the impure personalty.  
 regards real *Jeffries v. Alexander*, 7 D. M. & G. 525; 8 H. L. 594; *Fox v. Lowndes*, 19 Eq. 453.

But where A. covenants to pay a sum to trustees for B. for life with remainder as B. appoints, and B. appoints to a charity, the appointment is good, though the sum may be payable out of impure personalty of A. *In re Robson*; *Emley v. Davidson*, 19 Ch. D. 156.

Shares in public companies are not within the statute,

8. Shares in companies, whether incorporated or not, are not within the statute, provided land is held by them only for the common purposes of the undertaking, and this is the case whether the shares are declared to be personal estate or not, provided the right of the shareholder is merely to call for a share of the profits, and not for a specific part of the land itself. *Walker v. Milne*, 11 B. 507; *Myers v. Perigal*, 11 C. B. 90; 2 D. M. & G. 599; *Edwards v. Hall*, 11 Ha. 1; 6 D. M. & G. 74; *Hayter v. Tucker*, 4 K. & J. 243; *Entwistle v. Daris*, 4 Eq. 272. *Morris v. Glyn*, 28 B. 218, cannot be considered law.

The surplus lands stock of the Metropolitan Railway has been held pure personalty within this principle. *Re Hollon*; *Forbes v. Hardeastle*, 68 L. T. 160; 69 L. T. 425.

It makes no difference that the company whose shares are in question has placed itself in the position of landlord, by letting its land to another company. *Linley v. Taylor*, 1 Giff. 67; 2 D. F. & J. 84.

unless each shareholder is entitled to a definite proportion of land.

But if the land is held in trust for each individual shareholder in proportion to his shares, so that each shareholder has a direct and definite interest in the land, the shares are within the statute. *Baxter v. Brown*, 7 M. & Gr. 198. See *Watson v. Spratley*, 10 Ex. 222.

9. As to charges created by public statutory undertakings:—

Railway debentures are not within the Act.

a. The debentures, mortgage debentures and debenture stock of railway companies are not within the Act, whatever may be the form of the instruments creating them. *Walker v. Milne*, 11 B. 507; *Holdsworth v. Davenport*, 3 Ch. D. 185; *In re Mitchell's Estate*; *Mitchell v. Moberly*, 6 Ch. D. 655; *Attree v. Hawe*, 9 Ch. D. 337; *Re Yerbury's Estate*; *Ker v. Dent*,

62 L. T. 55; overruling *Ashton v. Lord Langdale*, 4 De G. & S. 402. Chap. XXVII.

The principle of these decisions is that a charge which only gives a right to the net earnings of an undertaking does not confer an interest in land; and although tolls derived from land may also be charged, they are only charged incidentally to the charge on the undertaking.

On the same principle, a waterworks mortgage issued by a corporation, charging the rents, rates, and waterworks, has been held outside the Act, on the ground that it was practically a mortgage of the undertaking. *In re Parker; Wignall v. Park*, (1891) 1 Ch. 682; not following *Chandler v. Howell*, 4 Ch. D. 651. Waterworks mortgage.

*b.* On the same principle, bonds of a corporation charging the borough fund are not within the Act, although the fund arises partly from the rents of land. The principle is, that the charge is only a charge on the floating balance of a fund remaining after purposes made prior to the charge by statute have been satisfied, and that, therefore, no receiver of the rents could be appointed. *In re Thompson; Bedford v. Teal*, 45 Ch. D. 161. Bonds charging the district fund created by the Public Health Act, 1875, are probably not within the Act, although the fund is partly composed of the proceeds of sale of surplus lands directed by statute to be sold; and certainly not within the Act if there are no surplus lands. *In re Thompson, supra.* Corporation bonds.

Leeds corporation debenture stock, which is by statute charged "upon the revenues of all landed and other property" of the corporation, is not within the Act. *In re Pickard; Elmsley v. Mitchell*, (1894) 2 Ch. 88; 3 Ch. 704.

Manchester corporation debenture stock which is by statute a charge upon "the city rate and all landed and other property vested in or belonging to the corporation" and Metropolitan Consolidated Stock which is a charge "indifferently on the whole of the lands, rents, and property" of the Metropolitan Board of Works are within the Act. *Re Holmes; Holmes v. Holmes*, 63 L. T. 477; 60 L. J. Ch. 267; *Cluff v. Cluff*, 2 Ch. D. 222; *In re Crossley; Birrell v. Greenhough*, (1897) 1 Ch. 928.

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Charge on  
specific tolls.

c. Where there is a charge on specific tolls, rates, or dues, the charge is within the Act, if the toll, rate, or due is an interest in, or connected with land. *Knapp v. Williams*, 4 Ves. 480, n.; *In re Christmas*; *Martin v. Lacon*, 33 Ch. D. 332; *In re David*; *Buckley v. Royal National Lifeboat Institution*, 41 Ch. D. 168; 43 Ch. D. 27.

Thus, duties leviable by harbour commissioners on all ships coming within certain limits, whether they use the land of the commissioners or not, are not connected with land; but tolls received for passing over a bridge, the approaches to which belong to the mortgagors, are connected with land. *In re Christmas*, *supra*; *In re David*, *supra*.

Charge on  
police rates,  
poor rates.

d. The principle of *Attree v. Haue* has no application to cases in which tolls, rates or dues are specifically mortgaged (*In re Christmas*, *supra*; *In re David*, *supra*), but it has been sometimes treated as governing such cases. Thus, a charge by justices of the peace on the security of the police rates since 7 & 8 Vict. c. 38 (*In re Harris*; *Jackson v. Governors of Queen Anne's Bounty*, 15 Ch. D. 561), and a charge on rates leviable by distress in the same manner as poor rates (*Jervis v. Lawrence*, 22 Ch. D. 202), have been held—in both cases on the authority of *Attree v. Haue*—to be outside the Act. But probably the older cases, which decided that police rates and poor rates were within the Act, would now be upheld. *House v. Chapman*, 4 Ves. 542; *Finch v. Squire*, 10 Ves. 41; *Thornton v. Kempson*, Kay, 592; see *In re Christmas*, 33 Ch. D. p. 342.

Rent, royal-  
ties, fixtures.

10. Arrears of rent due at the testator's death (a), apportioned rent (b), a royalty on minerals then due (c), and tenants' fixtures (d), are not within the Act. *Edwards v. Hall*, 11 Ha. 1; 6 D. M. & G. 74 (a); *Thomas v. Stowell*, 18 Eq. 198 (b); *Brook v. Badley*, 4 Eq. 106 (c); *Johnston v. Swann*, 3 Mad. 457 (d).

Money to be  
invested in  
land.

Money to be  
invested on  
real or mort-  
gage security.

B. As to what is a gift of personalty to be laid out in the purchase of land or any interest therein within the Mortmain Act:

1. Money directed to be invested on real securities, or even merely on mortgage security generally, is within the Act. *Baker v. Sutton*, 1 Kee. 224.

The same is the case if the ultimate object of the bequest is investment in land, though other investments may be authorised in the meantime. *Mann v. Burlingham*, 1 Kee. 235; *A.-G. v. Hodgson*, 15 Sim. 146. Chap. XXVII.

But the gift is valid if an option is left to the trustees; for instance, if money is directed to be invested in real or other securities. *A.-G. v. Goddard*, T. & R. 348; *Graham v. Paternoster*, 31 B. 30; *Re Beaumont's Trusts*, 32 B. 191.

2. A bequest of money to pay off a debt secured by mortgage, whether legal or equitable, of land belonging to a charity is void. *Corbyn v. French*, 4 Ves. 418; *Waterhouse v. Holmes*, 2 Sim. 162; *In re Lynall's Trusts*, 12 Ch. D. 211. Bequest to pay off the mortgage debt of a charity.

But this is not the case where the debt is no charge upon the land. *Bunting v. Marriott*, 19 B. 163.

3. A gift to improve, repair or enlarge an existing charitable institution is valid. *Edwards v. Hall*, 11 Ha. 1; 6 D. M. & G. 74; *Hawkins' Trust*, 33 B. 570. Gift to improve, enlarge, or repair.

4. A gift to build a charitable institution is held *prima facie* to imply a direction to purchase land for the purpose, and is void under 9 Geo. II. c. 36. *Chapman v. Brown*, 6 Ves. 404; *A.-G. v. Parsons*, 8 Ves. 186; *Pritchard v. Arbouin*, 3 Russ. 456; *A.-G. v. Davies*, 9 Ves. 535; *Martin v. Wellsted*, 2 W. R. 657; *Longstaff v. Rennison*, 1 Dr. 28; *Watmough's Trusts*, 8 Eq. 272; *Hawkins v. Allen*, 10 Eq. 246; *Pratt v. Harvey*, 12 Eq. 544; see *Re Taylor*; *Martin v. Freeman*, 58 L. T. 538. Gift to build a charitable institution is void.

A gift to erect a charitable institution does not become valid because made to a corporation which has power to hold land in mortmain, and, in fact, possesses land available for the purposes of the bequest. *In re Cox*; *Cox v. Davie*, 7 Ch. D. 204.

5. If, however, an option is given to the trustees either to build a charitable institution or bestow the money in some other manner which is legal, the bequest is good as regards the legal purpose. *Sorresby v. Hollins*, 9 Mod. 221; Amb. 211; *A.-G. v. Whitechurch*, 3 Ves. 141; *Incorporated Society v. Barlow*, 3 D. M. & G. 120; 17 Jur. 217; *Mayor of Faversham v. Ryder*, 18 B. 318; 5 D. M. & G. 350; *Edwards v. Hall*, Discretion to build or apply the money in some legal manner.

Chap. XXVII. 11 Ha. 1; 6 D. M. & G. 74; *Dent v. Allcroft*, 30 B. 385; *University of London v. Yarrow*, 1 De G. & J. 72.

And a bequest of impure personalty to such charities as trustees may select is good, since the power can be exercised in favour of charities exempt from the law of mortmain. *Lewis v. Allenby*, 10 Eq. 668; *Re Smith*; *Smith v. A.-G.*, 73 L. T. 732, n.; *In re Piercy*; *Whitwham v. Piercy*, (1898) 1 Ch. 565, overruling *Johnston v. Swann*, 3 Mad. 457; *Baker v. Sutton*, 1 Kee. 224, so far as they decide the contrary.

A discretion to trustees to give a legacy to the poor as they think fit is not within this principle. *In re Clark*; *Husband v. Martin*, 33 W. R. 516; 54 L. J. Ch. 1080.

Gift to  
"establish"  
a charity.

6. A direction to "establish" would, it seems, *prima facie* imply building, and come under the same rule as a bequest for building. *A.-G. v. Hodgson*, 15 Sim. 146; *Longstaff v. Rennison*, 1 Dr. 28; *Re Clancy*, 16 B. 295; *A.-G. v. Hall*, 9 Ha. 647; *Dunn v. Bornas*, 1 K. & J. 591; *Tatham v. Drummond*, 4 D. J. & S. 484.

The word may be used in such a context as to exclude building. *A.-G. v. Williams*, 2 Cox, 387; *Hill v. Jones*, 2 W. R. 657.

And the fact, that an annual sum only is given to establish a school, would apparently go to show that a testator did not contemplate building. *Hartshorne v. Nicholson*, 26 B. 58.

The same is the case with an annual sum given to "provide" a school, which may only mean that a school is to be hired. *Johnston v. Swann*, 3 Mad. 457; *Crafton v. Frith*, 20 L. J. Ch. 198; 15 Jur. 737.

A gift to "support or found" a school is valid. *In re Hedgman*; *Morley v. Croxon*, 8 Ch. D. 156.

A bequest to "found" a chapel implies building. *Hopkins v. Phillips*, 3 Giff. 182.

A direction to hire rooms, does not bring a gift within the Mortmain Act. *In re Robson*; *Emley v. Davidson*, 19 Ch. D. 156; *Re Holburne*; *Coates v. Mackillop*, 53 L. T. 212.

Gift to endow  
a charity.

On the other hand a gift to "endow" would not *prima facie* authorise building, though the word may be so used as to involve it. *Salisbury v. Denton*, 3 K. & J. 529; *Edwards v.*



*Hall*, 11 Ha. 1; *Sinnett v. Herbert*, 7 Ch. 233; *Kirkbank v. Hudson*, 7 Pr. 212; *Re Holburne*; *Coates v. Mackillop*, 58 L. T. 212. Chap. XXVII.

7. But, even though the object of the gift may *prima facie* imply the purchase of land, it may appear that the testator had no such intention. He may have contemplated the building as to be erected either on land already in mortmain, or on land to be provided after his death from some other source.

Evidence of intention that the testator did not contemplate the purchase of land.

a. Thus, if the testator contemplated land already in mortmain, a gift to build a charitable institution is good. This will be the case :—

- (i.) If land already in mortmain is expressly referred to in the will. *Gilubb v. A.-G.*, Amb. 373; *Brodie v. Duke of Chandos*, 1 B. C. C. 444, n.

Land in mortmain referred to expressly,

If it is uncertain, whether the land upon which the testator directs the money to be laid out is already in mortmain or not, an inquiry will be directed. *Champney v. Dary*, 11 Ch. D. 949.

- (ii.) If land already in mortmain is impliedly referred to, as by a direction to build in such manner as is consistent with law. *Dent v. Allcroft*, 30 B. 335; *Sewell v. Crewe-Read*, L. R. 3 Eq. 60.
- (iii.) External evidence may be adduced in order to show that the testator must have contemplated land in mortmain, though as to the exact amount of evidence necessary for this purpose the cases are not quite consistent. *A.-G. v. Hyde*, Amb. 751; *Giblett v. Hobson*, 3 M. & K. 517; *Booth v. Carter*, L. R. 3 Eq. 757; *Cresswell v. Cresswell*, 6 Eq. 69.

by implication,

by external evidence.

b. When the testator intends the buildings to be erected on land to be supplied from some other source after his death :—

- (i.) It is clear, that a direct inducement offered to any person to give land for the purpose of the building, as, for instance, a bequest to A. to build if he will give the land, is bad. *A.-G. v. Davies*, 9 Ves. 535.

Inducement to give land.

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Direction to  
beg land.

(ii.) If the trustees are directed to beg the land from some person, but their own implied power to purchase remains, the bequest is bad. *Mather v. Scott*, 2 Kee. 172.

Direction not  
to buy land.

(iii.) Where the bequest is to build, with an express direction that land is not to be bought for the purpose, or that the Mortmain Act is not to be violated, the bequest is valid, whether made conditional upon land being provided, or without any condition. *Henshaw v. Atkinson*, 3 Mad. 306; *A.-G. v. Williams*, 2 Cox, 387; *Cawood v. Thompson*, 1 Sm. & G. 409; *Philpott v. Governors of St. George's Hospital*, 6 H. L. 338 (overruling *Trye v. Corporation of Gloucester*, 14 B. 173); *Chamberlayne v. Brockett*, 8 Ch. 206; *In re White's Trusts*, 30 W. R. 897; *Re Jackson*; *Biscoe v. Jackson*, 35 Ch. D. 460.

Bequest to a  
charity, the  
object of  
which is to  
acquire land.

8. Upon similar principles, a bequest to the trustees of a charity, which exists only for the purchase of land is void. *Widmore v. Woodroffe*, Amb. 636; *Middleton v. Clitheroe*, 3 Ves. 794; *Denton v. Lord J. Mannors*, 25 B. 38; 2 De G. & J. 675.

On the other hand, it is good if it exists for the purchase of land or other objects. *Incorporated Society v. Barlow*, 3 D. M. & G. 120; *Carter v. Green*, 3 K. & J. 591; *Wilkinson v. Barber*, 14 Eq. 96.

9. A bequest of money to be employed in enlarging or improving a charitable object attempted to be created by a testator fails, if the original object is invalid. *A.-G. v. Hinxman*, 2 J. & W. 270; *Smith v. Oliver*, 11 B. 481; *Cramp v. Playfoot*, 4 K. & J. 479; *Green v. Britten*, 42 L. J. Ch. 187; *In re Cox*; *Cox v. Davie*, 7 Ch. D. 204; *Re Taylor*; *Martin v. Freeman*, 58 L. T. 538.

Bequest for  
foreign  
charity.

10. A bequest of the proceeds of sale of land in England to be laid out in the purchase of land for charitable purposes in a country where land may be well given to charity is void. *Curtis v. Hutton*, 14 Ves. 537; *A.-G. v. Mill*, 3 Russ. 328; 5 Bl. N. C. 593; 2 Dow & Cl. 393.

But the Statute of Mortmain leaves bequests of money to be laid out in the purchase of land for charitable purposes in

other countries untouched. *Mackintosh v. Townsend*, 16 Chap. XXVII. Ves. 330; see *Whicker v. Hume*, 7 H. L. 124.

The Statute of Mortmain does not apply to the Colonies. Therefore a gift by a testator domiciled in a colony of money to be laid out in purchasing land in England for a charitable purpose is good. *Mayor of Canterbury v. Wyburn*, (1895) A. C. 89; see *Jex v. McKinney*, 15 App. C. 77.

The Act 9 Geo. II. c. 36, did not, and the Act of 1888 does not extend to Ireland.

As regards that country, the Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 Vict. c. 97), enacts (sect. 16), that after the 1st January, 1845, no donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, tenements, or hereditaments, for such uses unless the deed, will, or other instrument containing the same shall be duly executed three calendar months at the least before the death of the person executing the same, with a provision as to registration of every deed or instrument not being a will.

A gift of money to be laid out in land for a charitable purpose was always valid in Ireland and is not affected by the Act (a); and the Act does not affect a gift of money invested on mortgage of land (b). *A.-G. v. Power*, 1 Ba. & Be. 145; *Pollock v. Day*, 14 Ir. Ch. 297 (a); *Stewart v. Barton*, I. R. 6 Eq. 215; *Murland v. Perry*, 3 L. R. Ir. 135 (b).

But a devise of land on trust for sale and to apply the proceeds for charitable purposes is avoided by the Act if the testator dies within three months. *Sherlock v. Blake*, 10 Ir. Jur. N. S. 350; *Donnellan v. O'Neill*, I. R. 5 Eq. 523.

#### C. Exceptions from the Statute of Mortmain.

The Universities of Oxford and Cambridge, and the colleges and houses of learning in the two Universities, and the Colleges of Eton, Winchester, and Westminster, are excepted from the operation of the Act 9 Geo. II. c. 36. But this exception only authorises devises to these institutions for all or some of the purposes for which they exist, and not upon trust for other charitable objects. *A.-G. v. Tancred*, 1 Ed. 10; 1 W. Bl. 90; Amb. 351; *A.-G. v. Whorwood*, 1 Ves. 534; *A.-G. v. Munby*, 1 Mer. 327.

Universities  
and colleges  
of Oxford and  
Cambridge,  
and Eton,  
Winchester,  
and West-  
minster  
excepted from  
the Act.

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And if there is a good devise of lands to a college for charitable objects, which the college refuses to accept, the object will be carried out *cy près*. *A.-G. v. Andrew*, 3 Ves. 633.

The Act of 1888, sect. 7 (1), continues the exception, and extends it to the Universities of London and Durham, and the Victoria University, and the colleges and houses of learning within any of these universities, and to Keble College.

Whether a college takes the legal estate.

Before the Wills Act, it seems that a devise to a college did not carry the legal estate, notwithstanding *Benet College v. Bishop of London*, 2 W. Bl. 1182, which was decided upon an erroneous interpretation of the statute 43 Eliz. c. 4, that statute being merely remedial and not intended to authorise what was illegal before. See *Incorporated Society v. Richards*, 1 D. & War. 258.

Whether a devise to a college since the Wills Act would carry the legal estate seems doubtful. See p. 106.

In what cases charities empowered to hold lands may take by devise.

The fact that a charity is empowered by Act of Parliament to hold lands does not entitle a testator to devise lands to it. *Robinson v. Governors of London Hospital*, 10 Ha. 19; *Nethersole v. School for the Indigent Blind*, 11 Eq. 1; *Chester v. Chester*, 12 Eq. 444.

But where charities are empowered to acquire lands by will, testators are of course entitled to devise lands to them. *Perring v. Traill*, 18 Eq. 88.

But it seems that such a power to take lands by devise, would not necessarily authorise a bequest of money secured on mortgage. *Chester v. Chester*, *supra*.

An Act passed before the Act 9 Geo. II. c. 36, and enabling a charitable corporation to take lands without a licence in mortmain, by authorising testators to devise lands to the corporation, does not exempt the corporation from the operation of 9 Geo. II. c. 36. *Luckraft v. Pridham*, 6 Ch. D. 205.

Redemption of land tax.

Under 42 Geo. III. c. 116, s. 50, money may be given by will or otherwise for redeeming the land tax on lands settled on charitable uses.

Under section 162 of the same Act land tax redeemed or purchased may be given by deed or will for the augmentation of any living.

The statute 43 Geo. III. c. 108, authorises the devise of lands not exceeding five acres, or of goods or chattels to the amount of 500*l.*, for erecting, repairing, or providing any church or chapel where the Liturgy of the Church of England is used, or any mansion-house for any minister of the said Church, and other similar purposes.

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Statute 43  
Geo. III.  
c. 108.

This Act does not extend to women covert without their husbands, and the Married Women's Property Act, 1882, has not removed the disability. *In re Smith's Estate*; *Clements v. Ward*, 35 Ch. D. 589.

Under this Act a secret trust to devote a chapel comprised in a residuary devise to the purpose of a parish church has been upheld. *O'Brien v. Tyssen*, 28 Ch. D. 372.

Under the same Act a bequest of 500*l.* towards building a church, if the testator survives the making of the will three months, is good. *Dixon v. Barlow*, 3 Y. & C. Ex. 677; *Girdlestone v. Creed*, 10 Ha. 480.

The Act, however, does not authorise a devise of lands to be sold and the proceeds to be applied towards the purposes of the Act. *Incorporated Church Building Society v. Coles*, 1 K. & J. 145; 5 D. M. & G. 324.

Under this Act gifts to keep in repair a parish church-yard (a), and to purchase a new clock for a parish church (b), have been held good. *In re Vaughan*; *Vaughan v. Thomas*, 33 Ch. D. 187 (a); *Re Hendry*; *Watson v. Blakeney*, 56 L. T. 908 (b).

The effect of the Act is that under a bequest towards building a church the legacy will be apportioned between the pure and impure personalty, and be paid out of pure personalty to the extent of its proportion, and out of the impure personalty to the extent of 500*l.* *Sinnett v. Herbert*, 7 Ch. 232; *Champney v. Dary*, 11 Ch. D. 949.

Under 6 & 7 Vict. c. 37, sect. 9, the Ecclesiastical Commissioners may constitute districts for spiritual purposes, and by sect. 22 land or money may be given by deed or will for the endowment of the minister of a district, or for providing a church or chapel under the Act.

Endowment  
of districts  
for spiritual  
purposes.

Under this Act a direction to apply a sum for the purposes

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Public parks,  
schools, and  
museums.

By the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), sect. 6, twenty acres may be given for a park, two acres for a museum, and one acre for a school-house, but the will must be executed twelve months before the death.

Ancient  
monuments.

By the Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), ancient monuments, to which the Act applies, may be devised to the Commissioners of Works who may accept the devise.

Department  
of Science and  
Art.

By the Department of Science and Art Act, 1875 (38 & 39 Vict. c. 68), land may be devised to the Department of Science and Art for the purposes of their charter or for any educational or public purpose.

Technical and  
Industrial  
Institutions

By the Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), land may be given by will for the purposes of that Act free from the restrictions of the Acts of 1888 and 1891, see sect. 10.

A list of charities excepted from the Mortmain Act will be found in Tudor's Real Property Cases, 4th ed. p. 680.

Secret trust  
of land in  
favour of  
charity is bad,  
but the  
devisee takes  
the legal  
estate.

The Statute of Mortmain cannot be avoided by a secret trust in favour of a charity. *Russell v. Jackson*, 10 Ha. 204.

In such a case, however, the devisee takes the legal estate. *Sweeting v. Sweeting*, 12 W. R. 289.

Where land is devised on trust for a person for life with remainder to charity, the legal estate is well devised for life. *Young v. Grose*, 4 C. B. 668.

The legal estate passes when the trust is for charity, and for other objects which are valid. *Doe d. Chidgey v. Harris*, 16 M. & W. 517, 518.

But a devise of lands on an express trust for charity only is void, as regards the legal estate as well, by the statute 9 Geo. II. c. 36. *Doe d. Burdett v. Wrighte*, 2 B. & Ald. 710; see *Churcher v. Martin*, 42 Ch. D. 312; *In re Lacy*; *Royal General Theatrical Fund Association v. Kydd*, (1899) 2 Ch. 149.

## CHAPTER XXVIII.

SUCCESSIVE AND CONCURRENT INTERESTS, JOINT  
TENANCY AND TENANCY IN COMMON.

## I. DEVISE TO A CLASS IN TAIL.

In some cases the question has arisen whether the gift is to several persons concurrently, or whether they are intended to take successively; thus a devise to the sons of a person in tail is *primâ facie* a gift to a class. *De Windt v. De Windt*, L. R. 1 H. L. 87; *Surtees v. Surtees*, 12 Eq. 400.

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Devise to a class in tail gives concurrent interests,

But, if there is a general intention manifest to keep the estates together in a single line of enjoyment, the members of the class will take successively. *Cradock v. Cradock*, 4 Jur. N. S. 626, 656; *Allgood v. Blake*, L. R. 7 Ex. 339; *ib.* 8 Ex. 160.

unless there is an intention expressed to keep the property together in one line of enjoyment.

## II. GIFTS TO A PARENT AND CHILDREN.

In the same way a gift to a parent and children is *primâ facie* a gift to them concurrently. *Mason v. Clarke*, 17 B. 126; *Sutton v. Torre*, 6 Jur. 234; *Wilson v. Maddison*, 2 Y. & C. C. 372; *Beales v. Crisford*, 13 Sim. 592; *Newill v. Newill*, 12 Eq. 432; 7 Ch. 253; *In re Seyton*; *Seyton v. Satterthwaite*, 34 Ch. D. 511; *In re Davies' Policy Trusts*, (1892) 1 Ch. 90; *Re Wilmot*; *Wilmot v. Betterton*, 76 L. T. 415. See *Cape v. Cape*, 2 Y. & C. Ex. 543.

Gift to a parent and children gives them concurrent interests.

The fact that the gift is to the parent in trust for herself and her children, is not sufficient to show that they are not to take concurrently. *Newill v. Newill*, 7 Ch. 253; *Jubber v. Jubber*, 9 Sim. 503; *In re Byrne's Estate*, 29 L. R. Ir. 250; *Atkinson v. Atkinson*, 62 L. T. 735. See *Curtis v. Graham*, 12 W. R.

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What is a  
contrary  
intention.

Words of  
distribution  
applied to the  
children only.

Words of  
limitation  
applied to the  
children only.

Settlement  
directed of the  
whole fund.

Gift of the  
whole fund to  
the separate  
use.

998. *Ward v. Grey*, 26 B. 485, probably goes beyond the present tendency of the Court.

But, if there is anything to show that the parent is to take a different interest from that of the children, he will take for life, with remainder to the children.

1. If the bequest is to A. and his children as tenants in common, if more than one, showing that the tenancy in common is to apply to children only, the father takes for life. *Doe d. Dary v. Burnesall*, 6 T. R. 30; 1 B. & P. 215, where issue must have meant children by the force of the gift over in default of issue of such issue. See *Doe d. Gilman v. Elrey*, 4 East, 313.

2. A devise to A. and his children and the heirs of the parent and children, gives a joint estate in fee, or an estate tail to the parent, according as there are or are not children living at the time of the devise. *Oates d. Hatterly v. Jackson*, 2 Str. 1172; *Underhill v. Roden*, 2 Ch. D. 494.

But a devise to A. and his children, and the heirs of the children, would give A. an estate for life with remainder to his children. *Jeffery v. Honeywood*, 4 Mad. 398, was decided on this ground, though it would seem the word heirs referred to the parent as well as the children.

3. If the bequest is to a father and his children, and there is a desire expressed that the whole fund should be settled or secured, a term which would have no meaning as applied to the father's interest as joint tenant, the father takes for life. *Vaughan v. Marquis of Headfort*, 10 Sim. 639; *Combe v. Hughes*, 14 Eq. 415.

If a continuing trust is created, which is contemplated as outlasting the parent's life, there is room for a similar argument in favour of a life interest in the parent. *Ogle v. Corthorn*, 9 Jur. 325.

4. Whether, where the gift is to the separate use of the mother, it will be considered a sufficient indication of intention to cut the interest of the parent down to a life interest is not certain. On the whole the better opinion seems to be, that where the words creating the separate use apply to the whole fund or legacy, it will be construed as giving the mother a life interest. *Newman v. Nightingale*, 1 Cox, 341; *French v.*



*French*, 11 Sim. 257; *Bain v. Lescher*, 11 Sim. 397; *Froggatt v. Wardell*, 3 De G. & S. 685; *Dawson v. Bourne*, 16 B. 29; *Jeffery v. De Vitre*, 24 B. 296; *Scott v. Scott*, 11 Ir. Ch. 114; *Ogle v. Corthorn*, 9 Jur. 325, in which case the Vice-Chancellor Wigram thought that a gift to the separate use was conclusive against the children participating with their mother; *Combe v. Hughes*, 14 Eq. 415.

On the other hand, the cases of *De Witte v. De Witte*, 11 Sim. 41, and *Bustard v. Saunders*, 7 B. 92 (which, however, only followed *De Witte v. De Witte*), are inconsistent with this rule. See *In re Seyton*; *Seyton v. Satterthwaite*, 34 Ch. D. 511, 515.

If the interest of the mother alone is given to her separate use, or the separate use attaches to the interests of all alike, no argument in favour of a life estate can be founded upon the separate use. *Fisher v. Webster*, 14 Eq. 283; *Newsom's Trusts*, 1 L. R. Ir. 373.

Separate use attached to parent's interest or to interests of all.

The same is the case if her interest only is directed to cease on marriage. *Izol v. Izol*, 11 W. R. 452.

5. If upon the marriage of their mother the fund is to be divided among the children, this affords an argument, that it is not to be divided before, and the mother takes for life or till marriage. *Mill v. Mill*, 1 R. 9 Eq. 104; *ib.* 11 Eq. 158; *In re M'Vicker's Contract*, 25 L. R. Ir. 307.

Division of the whole fund directed at a particular time.

6. If the whole fund is contemplated as remaining undisposed of, if there are no children, if there is a gift over, for instance, in default of children, the same construction is adopted. *Audsley v. Horn*, 26 B. 195; 1 D. F. & J. 226. See *Lampley v. Blower*, 3 Atk. 396.

Gift over of the entire fund if there are no children.

7. If the children are contemplated as taking shares in the whole fund by a direction, for instance, that if there is but one child the whole is to go to that child, since the children are to take the whole, the parent to take anything must take a life interest. *Garden v. Poulteney*, Amb. 499; 2 Ed. 323; *Audsley v. Horn*, 26 B. 195; 1 D. F. & J. 226.

Children contemplated as taking the whole fund.

8. If the bequest is such, as expressly to include all the children of the parent, and not merely those in being at the time of distribution, it will be construed to give a life estate

Express gift to afterborn children.

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to the parent, with remainder to the children, since it is a singular intention to impute to the testator that the parent's interest in the estate should continually diminish on the birth of a new child. *Jeffery v. De Vitre*, 24 B. 296; *Jeffery v. Honeywood*, 4 Mad. 398.

Part of the fund payable at a future period.

9. If the legacy is payable in part at once, and in part at a future period, the parent will take for life, as otherwise different classes of children might take the two portions. *Morse v. Morse*, 2 Sim. 485.

Words implying that children are not to take till their parent's death.

10. If the children are contemplated as not enjoying the property till after their mother's death, by being called heirs for instance, the parent takes for life only. *Crawford v. Trotter*, 4 Mad. 36; *Ogle v. Corthorn*, 9 Jur. 325; *Wilson v. Vansittart*, Amb. 561.

Reference to other gifts.

11. There may be a reference to another gift, to assist the Court in giving the parent a life interest. *French v. French*, 11 Sim. 257; *In re Owen's Will*, 12 Eq. 316.

Executory trust.

12. An executory trust for A. and her children will be settled on A. for life, and afterwards for her children. *In re Bellasis' Trust*, 12 Eq. 218.

### III. JOINT TENANCY, TENANCY IN COMMON AND BY ENTIRETIES.

#### A. Joint tenancy.

Individual and corporation.

Formerly an individual and a corporation could not hold as joint tenants (*Law Guarantee and Trust Society v. Bank of England*, 24 Q. B. D. 406), but this has been altered by the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20).

Gift to several with words of limitation is a joint tenancy.

A gift to two persons or to a class with words of limitation *prima facie* constitutes a joint tenancy between them.

Interests of joint tenants need not vest at the same time.

The rule, that the interests of joint tenants must vest at the same time, does not apply to estates raised by use, or to wills. *Macgregor v. Macgregor*, 1 D. F. & J. 63; *O'Hea v. Slattery*, (1895) 1 Ir. 7.

"All and every."

Thus, a gift to the children or to all and every the child or children of A. creates a joint tenancy between them. *Kenworthy*

v. *Ward*, 11 Ha. 196; *Morgan v. Britten*, 13 Eq. 28; *Binning v. Binning*, 13 R. 654; see *Jury v. Jury*, 9 L. R. Ir. 207.

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A devise to two persons who may intermarry, though they may both be married already, and the heirs of their bodies, makes them joint tenants in tail. Co. Litt. s. 25, p. 25b.

Devise to two  
in tail who  
may marry.

If an appointment under a special power is made in favour of A. and B. as joint tenants, and A. is not an object of the power, B. takes only a moiety, and the other moiety goes as in default of appointment. *In re Kerr's Trusts*, 4 Ch. D. 600.

Appointment  
to object and  
non-object.

B. Joint life estates several inheritances.

Intermediate between cases of joint tenancy and of tenancy in common falls a class of cases, in which, in order to give effect to the whole devise, joint estates for life and several inheritances are given.

A devise to several persons who cannot marry, and the heirs of their bodies, gives them joint estates for life with several inheritances in tail. *Fearne*, C. R. 35; *Cook v. Cook*, 2 Vern. 545; *Forrest v. Whitway*, 3 Ex. 367; *Edwards v. Champion*, 3 D. M. & G. 202, 214; *Tufnell v. Borrell*, 20 Eq. 194.

Devise to  
several in tail  
who cannot  
marry.

A devise to a man and two women, or to two men and one woman, and the heirs of their bodies, gives them joint estates for life and several inheritances. Co. Litt. 25b.

A devise to two husbands and their wives, and the heirs of their bodies, gives joint estates for life, and several inheritances; the one husband and wife the one moiety, the other husband and wife the other moiety. Co. Litt. 25b.

A devise to several and the heirs of their respective bodies, gives joint estates for life and several inheritances. But a devise to children and the heirs of their bodies respectively, gives several estates in tail. *In re Tiverton Market Act*; *Ex parte Tanner*, 20 B. 374.

Force of word  
respective.

In the case of real estate devised to several and their heirs a similar principle has been followed, words of severance being referred to the inheritance, leaving the life interests joint.

Devise to  
several in fee.

This construction is assisted if there is an express limitation to the survivor or such a word as jointly is used. *Barker v. Giles*, 2 P. W. 280; 3 B. P. C. 297; see *Cookson v. Bingham*, 3 D. M. & G. 668.

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Thus a devise to A. and B. equally as joint tenants, and their several and respective heirs, gives joint estates for life with several inheritances. *Doe d. Littlewood v. Green*, 4 M. & W. 229.

A devise to several and their heirs respectively creates a tenancy in common. *Torret v. Frampton*, Styles, 484.

A devise to several and their respective heirs, and a bequest of personalty to several and their respective executors, administrators, and assigns, gives, in the one case, joint estates for life and several inheritances, and in the other, joint interests for life and absolute interests in remainder. *In re Tiverton Market Act*, *supra*; *In re Atkinson*; *Wilson v. Atkinson*, (1892) 3 Ch. 52.

But a bequest of personalty to four persons and to each of their respective heirs, executors, administrators, and assigns creates a tenancy in common. *Gordon v. Atkinson*, 1 De G. & S. 478.

A devise to several and the survivor and the heirs of such survivor gives joint life estates with a contingent remainder in fee to the survivor. *Vick v. Edwards*, 3 P. W. 371; *Re Harrison*, 3 Anst. 836; *Fearne*, C. R. 357—359; see *Quarm v. Quarm*, (1892) 1 Q. B. 184, as to the effect of such a devise after the Wills Act.

But a devise to several and the survivor, their heirs and assigns for ever, gives joint estates in fee. *Doe v. Sotheran*, 9 B. & Ad. 628, 635.

C. Severance of joint tenancy.

1. Destruction of unity of estate.

Acquisition of  
reversion by  
joint tenants  
for life.

If there are joint tenants for life and the reversion is acquired by one of them either by purchase or descent the joint tenancy is severed as regards that one. *Wiscot's Case*, 2 Rep. 60; *Robert Morgan's Case*, 2 Anderson, 202.

A joint tenant  
becoming  
trustee for  
himself and  
others.

And a joint tenancy is severed if the property becomes vested in one of the joint tenants as trustee for himself and the other joint owner. *Connolly v. Connolly*, 1 I. R. 1 Eq. 376.

2. Severance by disposition.

Disposition  
by joint  
tenant.

A joint tenancy may also be severed by a disposition by one of the joint owners amounting at law or in equity to an assignment of the share.

If the disposition is to one of the joint tenants, the joint tenancy is severed as regards the share conveyed, but subsists as regards the other shares. Litt. 304.

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A covenant to settle severs a joint tenancy, if the covenant applies to the share of the joint tenant, though the joint tenancy may be created by an instrument not coming into operation till after the date of the covenant. *Caldwell v. Fellowes*, 9 Eq. 410; *Baillie v. Treharne*, 17 Ch. D. 388; *In re Hewett*; *Hewett v. Hallett*, (1894) 1 Ch. 362.

Covenant to  
settle.

The fact that the covenant is entered into by an infant does not prevent a severance if the settlement is not avoided when the infant comes of age. *Burnaby v. Equitable Reversionary Interest Society*, 28 Ch. D. 416.

Covenant by  
infant.

A mortgage by one joint tenant of his interest of course severs the joint tenancy. *In re Pollard's Estate*, 3 D. J. & S. 541.

Mortgage.

A partial disposition may also sever the joint tenancy.

Partial  
disposition.

Thus, if two are joint tenants in fee, and one makes a lease for the life of the lessee the joint tenancy is wholly severed. Litt. 302; Co. Litt. 191b.

So if two are joint tenants for years a lease for years by one completely severs the joint tenancy. Co. Litt. 192a.

Possibly a lease for years by a joint tenant in fee only severs the joint tenancy during the term. *Clerk v. Clerk*, 2 Vern. 323; an unsatisfactory case.

A lease by one joint tenant and the husband of the other, the rent being reserved to the lessors jointly, does not sever the joint tenancy. *Palmer v. Rich*, (1897) 1 Ch. 134.

An application by petition or summons by a joint tenant for payment of his share does not sever the joint tenancy until an order for payment is made. *In re Wilks*; *Child v. Bulmer*, (1891) 3 Ch. 59.

Petition for  
payment.

The old law as to severance by marriage has become of small importance since the Married Women's Property Act.

Severance by  
marriage.

Before that Act marriage severed the wife's joint tenancy as regards chattels. *Bracebridge v. Cook*, Plowd. 416, 418.

It did not sever the wife's joint tenancy in freeholds or chattels real or choses in action, whether in reversion or possession.

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Co. Litt. 185b; *In re Barton's Will*, 10 Ha. 12; *Armstrong v. Armstrong*, 7 Eq. 518; *In re Butler's Trusts*; *Hughes v. Anderson*, 38 Ch. D. 286, overruling *Baillie v. Trehearne*, 17 Ch. D. 388; *Palmer v. Rich*, (1897) 1 Ch. 194; see *Loneragan v. Hoban*, (1896) 1 Ir. 401.

3. Severance by agreement.

Agreement to sever.

A joint tenancy may also be severed by agreement between the parties which may be either in writing or may be inferred from a course of dealing. *Gould v. Kemp*, 2 M. & K. 304; *Wilson v. Bell*, 5 Ir. Eq. 501; *Williams v. Hensman*, 1 J. & H. 546.

Joint tenancy in income.

A joint tenancy in income is severed as regards each instalment as soon as it becomes payable. *Walsmsley v. Foxhall*, 40 L. J. Ch. 28.

D. What creates a tenancy in common.

The Court leans to a tenancy in common.

1. The Court leans towards a tenancy in common, and will prefer it, when there is a doubt, or the testator has given the legatees a choice between a joint tenancy and tenancy in common. *Booth v. Alington*, 3 Jur. N. S. 835; 27 L. J. Ch. 117; 5 W. R. 811; *Oakley v. Wood*, 16 L. T. 450; 37 L. J. Ch. 28.

Jointly and equally.

So in several cases where there have been such words as "jointly and equally" the Courts have held the gift a tenancy in common. *Ettricke v. Ettricke*, Amb. 656; *Perkins v. Baynton*, 1 B. C. C. 118.

What words create a tenancy in common.

2. Words of division or distribution, such as "to be divided" or "equally," or "between," or "amongst," or "respectively," make a tenancy in common. *Vanderplank v. King*, 3 Ha. 1; *Campbell v. Campbell*, 4 B. C. C. 15; *A.-G. v. Fletcher*, 13 Eq. 128. See *Re Moore's Settlement Trusts*, 10 W. R. 315.

But a direction to divide property upon a certain event is consistent with a joint tenancy till the event happens. *Cookson v. Bingham*, 3 D. M. & G. 668, 696; *Jury v. Jury*, 9 L. R. Ir. 207.

Part or share.

And the use of the word "share," or similar words, with reference to the interest of the legatees, or even the word "participate," has the same effect. *Gant v. Lawrence*, Wightw. 395; *Ire v. King*, 16 B. 46; *Paterson v. Rolland*, 28 B. 347;

*Robertson v. Fraser*, 6 Ch. 696. See *Alloway v. Alloway*, 4 D. & War. 380; *Jones v. Jones*, 29 W. R. 786.

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8. And it has been held, that where there is a gift to a class when they arrive at twenty-one years or upon their becoming of age so that some may take vested and others contingent interests, they take as tenants in common. Possibly the Court in these cases read the words as to coming of age as equivalent to when they respectively come of age. *Woodgate v. Unwin*, 4 Sim. 129; *Hand v. North*, 12 W. R. 229; 10 Jur. N. S. 7; 38 L. J. Ch. 556; see *Kenworthy v. Ward*, 11 Ha. 196; *Buck v. Barwise*, 6 N. R. 375; *Macgregor v. Macgregor*, 1 D. F. & J. 63.

Effect of a  
gift at twenty-  
one.

4. If there are any incidents attached to the gift inconsistent with a joint tenancy, it will be construed as a tenancy in common:—

Incidents  
inconsistent  
with a joint  
tenancy.

If, for instance, one of the objects of the gift is to take the interest of the other, not merely on the death of the latter, but on his death without issue, or on some other contingency. *Ryves v. Ryves*, 11 Eq. 589.

Of course a gift over of the interest of one joint tenant in certain events to a third person can have no such effect. *Edwardes v. Jones*, 33 B. 348; see *Yarrow v. Knightly*, 8 Ch. D. 796.

5. Where there is a power to appoint to persons, which would authorise a tenancy in common, the Court, if compelled to exercise the power, will make the legatees tenants in common. *White's Trusts*, Joh. 656; *Phene's Trusts*, 5 Eq. 346; *In re Susanni's Trusts*, 47 L. J. Ch. 65; *Wilson v. Duguid*, 24 Ch. D. 244; see *Armstrong v. Armstrong*, 7 Eq. 518.

Power to  
appoint to  
persons as  
tenants in  
common.

6. It would seem, that where a clear executory trust is created by a will, for instance, by a direction to make a settlement upon a person and her children, the children would take as tenants in common. *Head v. Randall*, 2 Y. & C. C. 291; *Stanley v. Jackman*, 23 B. 450. See *Taggart v. Taggart*, 1 Sch. & L. 84; *Synge v. Hales*, 2 Ba. & Be. 499.

Executory  
trust in favour  
of a parent  
and children.

At any rate, this is clearly the case if the ordinary powers and trusts are directed to be inserted in the settlement. *Mayn v. Mayn*, 5 Eq. 150.

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But a mere direction to secure a fund in favour of a class will not make them tenants in common. *White v. Briggs*, 2 Ph. 583; *Owen v. Penny*, 14 Jur. 359.

Issue substituted for parents take as joint tenants between themselves.

7. If there is a gift to children then living and the issue of those then dead as tenants in common, or to be equally divided among children then living and the issue of those then dead, the issue in each case to take a parent's share, the issue take as joint tenants *inter se*. In these cases the words of severance occur once only and are limited to create a tenancy in common among the children and *stirpes*. *Penny v. Clarke*, 1 D. F. & J. 425; *Macgregor v. Macgregor*, 1 D. F. & J. 63; *Hodgson's Trusts*, 1 K. & J. 178; *Coe v. Bigg*, 1 N. R. 536; *Lanphier v. Buck*, 2 Dr. & Sm. 484; *In re Yates*; *Bostock v. D'Eyncourt*, (1891) 3 Ch. 53. *Re Flower*; *Goodwyn v. Matheson*, 62 L. T. 216. *Shepherdson v. Dale*, 10 Jur. N. S. 156, may be taken to be overruled.

Double words of severance make issue tenants in common.

But a gift to be divided among children living at a certain date and the issue of those then dead as tenants in common creates a tenancy in common between the issue by force of the double words of severance. *Lyon v. Coward*, 15 Sim. 287; *Hodges v. Grant*, 4 Eq. 140; *In re Sophia Smith*, 58 L. J. Ch. 661; *Re Quirk*; *Quirk v. Quirk*, 61 L. T. 364; 37 W. R. 796. *Coe v. Bigg*, 1 N. R. 536, if inconsistent with this rule may be considered overruled.

Severance of joint tenancy as regards the share of issue substituted for their parent.

8. If there is a gift to parents in joint tenancy and a direction that the children of parents dying are to stand in the place of the parents and take their shares, there is with regard to the *stirpes* of children so taking a severance of the joint tenancy. *Heasman v. Pearce*, 7 Ch. 275.

E. Tenants by entireties.

Tenants by entireties.

Where real or personal property was before the Married Women's Property Act given to a husband and wife, though with a declaration that they were to be joint tenants, they held by entireties, and on the death of one the other took not *jure accrescendi*, but by virtue of the original limitation. *Co. Litt.* 187a; *Kelly v. Pollock*, 6 Ir. C. L. 367.

Real estate.

In the case of real estate held by entireties, neither husband nor wife can alienate the property without the consent of the



other, nor sever the tenancy. Co. Litt. 187a, b; *Doe v. Parratt*, 5 T. R. 652.

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In the case of personalty the right of the wife is destroyed, if the husband reduces the property into possession, and the wife has no equity to a settlement. *Atcheson v. Atcheson*, 11 B. 485; *Ward v. Ward*, 14 Ch. D. 506; *In re Bryan; Godfrey v. Bryan*, 14 Ch. D. 516.

Personalty.

It would seem, however, that the Court would preserve the wife's right by survivorship by preventing the husband from alienating the property during her life. *Atcheson v. Atcheson*, 11 B. 485.

In the case of chattels real held by entireties, the husband can destroy his wife's right by survivorship by alienating the chattels real. In the report of the case of *Grute v. Locroft*, Cro. El. 287, usually cited as an authority on this question, the tenancy is stated to have been joint and not by entireties. It may have been a joint tenancy created before marriage. See 2 Preston, Abst. 57; Foster on Joint Ownership. 62; *Knor v. Wells*, 2 H. & M. 674.

Chattels real.

Where husband and wife are tenants by entireties a decree absolute for divorce makes them joint tenants. *Thoruley v. Thoruley*, (1893) 2 Ch. 229.

Effect of  
divorce.

A gift to the husband and wife by a will made after the commencement of the Married Women's Property Act, 1882, (the 1st January, 1883), creates a joint tenancy between them. *Thoruley v. Thoruley*, (1893) 2 Ch. 229.

Married  
Women's  
Property Act.

## CHAPTER XXIX.

## ESTATES IN FEE AND IN TAIL.

## I. WORDS TO PASS THE FEE.

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1. WORDS of limitation were never necessary to pass the fee in a devise of lands held in ancient demesne. *Winch.* 1.

Devise to A.  
and his heirs.

A devise to a man and his heirs gives him the fee, though he may be a bastard, and can have, therefore, only heirs of his body. *Idle v. Cook*, 1 P. W. 78.

Devise to A.  
and his lawful  
heirs.

A devise to A. and his lawful heirs carries a fee. *Simpson v. Ashworth*, 6 B. 412; *Matheys v. Gardiner*, 17 B. 254.

Devise to A.,  
his executors  
and adminis-  
trators.

So, too, a devise to a man, his executors and administrators, gives him the fee. *Rose d. Vere v. Hill*, 3 Burr. 1881.

A devise of gavelkind land to a man and his eldest heir passes the fee. *Co. Litt.* 27a.

The testator  
may show  
that he meant  
by heirs heirs  
of the body.

2. The testator may, however, show by explanatory expressions that he used the word heirs as equivalent to heirs of the body. *Doe d. Jearrod v. Banister*, 7 M. & W. 292; *Jenkins v. Hughes*, 8 H. L. 571; see, too, 4 Mad. 67; *Biddulph v. Lees*, E. B. & E. 289; 6 W. R. 592; 7 W. R. 309.

Thus, a devise to the first and other sons of A. and their heirs, followed by a gift over in default of such issue or by expressions showing that the sons are to take in succession gives the first and other sons successive estates tail. *Lewis d. Ormond v. Waters*, 6 East, 337; *Hennessey v. Bray*, 33 B. 96.

Effect of gift  
over in default  
of heirs to a  
collateral  
heir.

3. Heirs both in a deed and will will be held equivalent to heirs of the body, if there is a limitation over in default of heirs or a limitation by way of remainder to a person who may be, or to several persons some of whom may be collateral heir or heirs to the first taker, the limitation over to a

collateral heir showing that by heirs the testator meant heirs of the body. *Webb v. Hearing*, Cro. Jac. 415 ; *Doe d. Littledale v. Smeddle*, 2 B. & Ald. 126 ; *Wall v. Wright*, 1 D. & Wal. 1 ; *Harris v. Davis*, 1 Coll. 416 ; *In re Smith's Estate*, 27 L. R. Ir. 121. Chap. XXIX.

The rule does not apply where the gift over is on failure of issue ; therefore, a gift to several in fee, and if they die without issue to a collateral heir will, since the Wills Act, give a fee with an executory devise over, as it would before the Act have given an estate tail by force of the gift over being in default of issue, not because it was to a collateral heir. See *Gwynne v. Berry*, 1 R. 9 C. L. 494 ; *Fay v. Fay*, 5 L. R. Ir. 274.

4. If there is a devise to A., which gives A. the fee, either by express limitation or by construction, followed by a gift over if he dies without heirs of the body or issue, if these words import an indefinite failure of issue, A.'s estate is cut down to an estate tail. *Tracy v. Glover*, cit. 3 Leon. 180 ; *Denn v. Slater*, 5 T. R. 885 ; *Dansey v. Griffiths*, 4 Mau. & S. 61 ; *Tenny v. Agar*, 12 East, 253 ; *Romilly v. James*, 6 Taunt. 263 ; *Morgan v. Morgan*, 10 Eq. 99 ; see *Bowen v. Lewis*, 9 App. C. 890.

Effect of a gift over in default of issue upon a prior devise in fee.

If, however, the failure of issue is not an indefinite failure of issue, there is no necessity for this construction, and the gift over will take effect as an executory devise. *Right v. Day*, 16 East, 67 ; *Doe d. King v. Frost*, 3 B. & Ald. 546 ; *Parker v. Birks*, 1 K. & J. 156 ; *Ex parte Davies*, 2 Sim. N. S. 114 ; *Blinston v. Warburton*, 2 K. & J. 400 ; *McEnally v. Wetherall*, 15 Ir. C. L. 502 ; *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121.

It appears that in a deed a limitation over upon death without such issue or without leaving issue will not cut down a previous limitation in fee to an estate tail. *Idle v. Cook*, 1 P. W. 70 ; *Olivant v. Wright*, 9 Ch. D. 646 ; see *Morgan v. Morgan*, 10 Eq. 99 ; *Arthur v. Walker*, (1897) 1 Ir. 68.

When a clear estate in fee is given by a will a reference to it by codicil as an entail will not cut down the estate given by the will. *Van Grutten v. Foxwell*, (1897) A. C. 658 ; see too *Crumpe v. Crumpe*, (1899) 1 Ir. 359 ; (1900) A. C. 127.

Reference in codicil to estate in fee as an entail.

Words of limitation appear to be unnecessary even in a deed, to pass the absolute interest in an estate *pur autre vie*. *Brenan v. Boyne*, 16 Ir. Ch. 87. Estate *pur autre vie*.

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Words of limitation not necessary to pass the fee.

Effect of the Wills Act in passing the fee.

Contrary intention.

Devise of rents and profits carries the fee.

Exception carries as large an estate as the property out of which it is excepted.

The estate of a *cestui que trust* is commensu-

5. Before the Wills Act a devise without words of limitation passed only a life interest unless there could be found in the will sufficient evidence of intention to pass the fee. There is a long list of cases in which the question what expression of intention is sufficient for this purpose has been considered. These cases, which will be found in earlier editions of this work, are omitted here as they are now practically obsolete, since by sect. 28 of the Wills Act, a devise without words of limitation passes the fee or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention shall appear by the will.

The fact that the will contains other devises with words of limitation, will not prevent a devise without such words from passing the fee. *Wisden v. Wisden*, 2 Sm. & G. 396.

Nor will a power given to the devisee to appoint the property generally to her children cut a devise without words of limitation down to a life estate. *Brook v. Brook*, 3 Sm. & G. 280.

But a devise without words of limitation, followed by a devise of the same property to another person with words of limitation, will give the first devisee a life interest only. *Gravenor v. Watkins*, L. R. 6 C. P. 500.

6. A devise of rents and profits or of the income of lands carried an estate for life in the lands before the Wills Act, and since the Act it carries the fee. *Mannox v. Greener*, 14 Eq. 456.

The same is the case with a devise of rents and profits for a time that may last for ever. *Bunbury v. Doran*, I. R. 9 C. L. 284.

But a devise of a specific annual sum out of land, though it happens to be the whole amount of the rents and profits, will not carry the land. *Going v. Hanlon*, I. R. 4 C. L. 144.

7. Under the old law it was held that where property was excepted out of a devise in fee, the exception carried as large an interest as the devise. *Doc d. Knott v. Lawton*, 4 Bing. N. C. 455; 6 Sc. 308; *Bennett v. Bennett*, 2 Dr. & Sm. 266; see *Hill v. Rattey*, 2 J. & H. 684.

8. The estate of a *cestui que trust* is commensurate with that of his trustee, and therefore, where land is devised to a

trustee and his heirs in trust for a person without words of limitation, the latter takes the fee. *Moore v. Cleghorn*, 10 B. 423; 16 L. J. Ch. 469; 17 *ib.* 400; *Knight v. Selby*, 3 Sc. N. R. 409; 3 M. & Gr. 92; *Challenger v. Shepherd*, 8 T. R. 597; *Smith v. Smith*, 11 C. B. N. S. 121; see *In re Whiston's Settlement*; *Loratt v. Williamson*, (1894) 1 Ch. 661; *Re Bennett's Estate*, (1898) 1 Ir. 184.

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rate with that of the trustee.

So under a devise to trustees in fee upon trust for a life tenant with remainder in trust for a class without words of limitation, the remaindermen take the fee. *Knight v. Selby*, 3 Sc. N. R. 409; 3 M. & Gr. 92; *Maden v. Taylor*, 45 L. J. Ch. 569.

The fact that there are executory gifts over does not prevent the application of the rule, so far as the gifts over do not take effect. *Yarrow v. Knightly*, 8 Ch. D. 736.

The above rule does not apply, where the trustees take for the benefit of ulterior devisees as well. *In re Pollard's Estate*, 3 D. J. & S. 541; see *Sherwin v. Kenny*, 16 Ir. Ch. 138; *Blackhall v. Gibson*, 2 L. R. Ir. 49.

## II. WORDS TO PASS AN ESTATE TAIL.

Copyholds not being within the statute *de donis* are entailable only by custom. In the absence of custom a devise of copyholds in words which would create an estate tail in freeholds will give a fee simple conditional on the birth of issue. *Doe d. Blesard v. Simpson*, 3 M. & G. 929; *Hardcastle v. Dennison*, 10 C. B. N. S. 606.

Copyholds.

A. The ordinary mode of limiting an estate tail is by the words "heirs of the body" or "issue."

What words create an estate tail.

And a devise to A. and his heirs male, or to A. and his heirs lawfully begotten, is an estate tail. *Baker v. Wall*, 1 Ld. Raym. 185; *Tufnell v. Borrell*, 20 Eq. 194; *Nanfan v. Legh*, 7 Taunt. 85; *Good v. Good*, 7 E. & B. 295; see *Crumpe v. Crumpe*, (1900) A. C. 127.

In the case of a deed such words pass a fee. Co. Litt. sec. 31.

Words of limitation superadded to the words heirs of the body will not cut down the estate tail of the ancestor. *Denn d. Gearing v. Shenton*, Cowp. 410.

Effect of superadded words of limitation and distribution.

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Nor will such words as "the elder son of the ancestor to be preferred to the second or younger son," as they merely indicate the notion the testator incorrectly entertained of the descent of an estate tail. *Fetherston v. Fetherston*, 3 Cl. & F. 67.

And probably a devise to A. and the heirs of his body as tenants in common would give A. an estate tail, notwithstanding *Doe d. Strong v. Goff*, 11 East, 668. See 2 Bl. 55, 58; 3 J. & Lat. 54; (1897) A. C. 674.

To create an estate tail the inheritance must be limited to the heirs of the body of the ancestor.

But the heirs, where the word is to be used as a word of limitation, must be the heirs of the ancestor. Therefore a devise to the husband for life, with remainder to the heirs of the body of the husband and wife, will not give an estate tail, because no person can be supposed to include in himself the heirs of himself and somebody else. *Fearne*, C. R. 38; see, too, *Allgood v. Withers*, 2 Burr. 1107.

But a devise to the husband and wife, with remainder to the heirs of the body of the husband and wife, gives them a joint estate tail. *Fearne*, C. R. 38.

Distinction between heirs of the body of the wife and heirs of the body of the wife begotten.

A devise to husband and wife for life, with remainder to the heirs on the body of the wife by the husband to be begotten, vests in both an estate tail; but if the remainder be limited to the heirs of the body of the wife by the husband to be begotten, the wife alone has an estate tail, the word heirs in the latter case being considered as applied to the wife only. *Alpass v. Watkins*, 8 T. R. 516; *Denn v. Gillott*, 2 T. R. 431; *Frogmorton d. Robinson v. Wharrey*, 2 W. Bl. 728.

Similarly, a devise to husband and wife for life, remainder to the heirs of the husband on the body of the wife begotten, gives the husband an estate in special tail. *Roe d. Aistrop v. Aistrop*, 2 W. Bl. 1228.

It follows that a devise to the wife for life, remainder to the heirs to be begotten on the body of the wife by the husband, gives the wife no estate tail, because the heirs are not applied to her body. *Gossage v. Taylor*, Sty. 325.

Effect of limitation to the heirs of the body of several ancestors who may intermarry.

Where there is a joint limitation for life to two persons who may by possibility intermarry (even though they may be respectively married already), with remainder to the heirs of their bodies, they take an estate tail. Co. Litt. 25b, sec. 25.

So, too, a devise to a man and the heirs of his body by a second wife gives him an estate tail executed in possession, though the devisee had a wife at the time. *Fearne*, C. R. 35; *Vent*. 228. Chap. XXIX.

And a devise to the wife for life, with remainder to the heirs of her body by the testator, where the testator has no issue by his wife, nevertheless makes the wife tenant in tail after possibility of issue extinct. *Platt v. Poules*, 2 Mau. & S. 65. Tenant in tail after possibility of issue extinct.

A devise to a man or the heirs of his body is an estate tail. *Parkin v. Knight*, 15 Sim. 88; *Wright v. Wright*, 1 Ves. Sen 409; *Harris v. Davis*, 1 Coll. 416; *Greenway v. Greenway*, 2 D. F. & J. 128. Devise to a man or the heirs of his body.

And a similar construction has sometimes been placed upon a devise to A. or his heirs, both before and since the Wills Act. See *Real v. Snell*, 2 Atk. 642, p. 645; *Lachlan v. Reynolds*, 9 Ha. 797; *Adshhead v. Willetts*, 29 B. 358. Construction of a devise to a man or his heirs.

Such a devise would, however, probably now be held to be substitutional in wills since the Wills Act, as it is no longer necessary to change "or" into "and," in order to give the devisee the fee. *Wingfield v. Wingfield*, 9 Ch. D. 658. See *Parsons v. Parsons*, 8 Eq. 260.

B. In some cases the word heir has been held equivalent to heir of the body, where there has been a direction that the land shall descend to the heirs; as, for instance, where there was a devise to A. for life, and then to descend to his female heir, whether sister or daughter. *Lewthwaite v. Thompson*, 36 L. T. 910; *Fay v. Fay*, 5 L. R. Ir. 274; see *Re Score*; *Tolman v. Score*, 57 L. T. 40.

C. With regard to realty, "the word issue in a will *primâ facie* means the same thing as heirs of the body, and is to be construed as a word of limitation." Per Parke, B., in *Slater v. Dangerfield*, 15 M. & W. 263. Construction of devises to a man and his issue.

Thus, a devise to A. and his issue, or to several and their issue, as tenants in common, would, it seems, give estates tail. *Martin v. Swannell*, 2 B. 249; *Bearer v. Nowell*, 25 B. 551; *Campbell v. Bouskell*, 27 B. 325.

A devise to A. and his issue living at his death, or to a wife and the issue of the marriage, has been held to give an

Chap. XXIX. estate tail. *University of Oxford v. Clifton*, 1 Ed. 473; *Walsh v. Johnston*, (1899) 1 Ir. 501.

A devise to A. and his issue, and the heirs of such issue, with a gift over in default of issue, before the Wills Act, has the same effect. *Franklin v. Lay*, 6 Mod. 258; 2 Bl. 59, n.

The rule in *Wild's Case* applies to a limitation to a man and his issue in fee as tenants in common.

And it has been held that the rule in *Wild's Case* applies to a devise to several and their issue and their heirs as tenants in common, so that the devisees take estates tail, if there are no issue at the date of the devise. *Underhill v. Roden*, 2 Ch. D. 494; Co. Litt. 9a. See *Cancellor v. Chancellor*, 11 W. R. 16.

If upon the will there is anything to show that the issue are to take as purchasers, for instance, a direction that they are to take vested interests at twenty-one, then under a devise to A. and his issue, A. and his issue take jointly in fee, and all issue born before the time of distribution come in. *Re Wilmot*; *Wilmot v. Betterton*, 76 L. T. 415.

In some cases, upon the context of the will, a devise to A. and his issue has been held to give A. a life interest with remainder to his issue. *Doe d. Dary v. Burnsall*, 6 T. R. 30; 1 B. & P. 215; *Doe d. Gilman v. Elvey*, 4 East, 813; *Hockley v. Maubey*, 1 Ves. Jun. 142. See the comments on the first two cases, 2 Jarm. p. 1260; *Re Wilmot*, 76 L. T. 415.

Devise in succession and in priority.

A devise to "the sons in succession" of A. gives the sons successive estates tail and a devise to A. for life and then to his children in priority in case he marries, sons to inherit before daughters, but in case he should die unmarried to B. and her heirs, gives the children of A. estates tail. *Studdert v. Von Steiglitz*, 23 L. R. Ir. 564; *In re Pennefather*; *Savile v. Savile*, (1896) 1 Ir. 249.

### III. WORDS OCCASIONALLY USED AS WORDS OF LIMITATION.

Words son and child used as words of limitation.

A. The words son and child may be used as words of limitation, if the testator has clearly shown his intention so to use them. "If the word son be not used as a *designatio personæ*, but with a view to the whole class, or as comprising the whole of the male descendants severally and successively, then it is



the manifest intention of the testator to give an estate tail." Chap. XXIX. *Mellish v. Mellish*, 2 B. & C. 520.

Thus, if the devise is to A., or to A. for life, and if he dies not having a son over, A. takes an estate in tail male in a case before the Wills Act. *Bifield's Case*, cited 1 Vent. 231; *S. C.* sub nom. *Milliner v. Robinson*, 1 Moore, 682, pl. 939; *Re Bird & Barnard's Contract*, 59 L. T. 166.

The same is the case if the devise be to A. for life, and then to his son if he has one, and in default of such issue over. *Robinson v. Robinson*, 1 Burr. 38; 2 Ves. Sen. 225; 3 Atk. 736; *Mellish v. Mellish*, 2 B. & C. 520; *Doe d. Garrod v. Garrod*, 2 B. & Ad. 87; *Murphy v. Johnston*, 6 Ir. Ch. 230; *Bell v. Bell*, 15 Ir. Ch. 517; *Andrew v. Andrew*, 1 Ch. D. 410; see *Bowen v. Lewis*, 9 App. C. 890.

But a devise to A. for life, and then to such son as she may leave, and his heirs and assigns, goes to all the sons of A. as joint tenants. *Beauchant v. Usticke*, W. N. 1880, 14.

B. The term "eldest son" is less susceptible of a collective meaning than son or child. But it will receive this meaning if the intention is clear. *Doe d. Burrin v. Chorlton*, 1 Scott N. R. 290; 1 M. & Gr. 429; *Lewis v. Puxley*, 16 M. & W. 733; *Clary's Trust*, 16 Ir. Ch. 438; *In re Childe*; *Childe-Pemberton v. Childe*, W. N. 1883, 48.

Eldest son.

And if the devise is to A. for life, then to his eldest son for life, and so on to the eldest son of the family, an estate tail in remainder will be given to A., and not to his eldest son, so as to take in the largest number of descendants. *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93.

As between an estate tail in the father or son the Court prefers the former.

C. In the same way the word children may be a word of limitation.

1. Thus a devise to A. to hold to him and his children for ever, or to A. and his children for ever, or to A. and his children lawfully begotten for ever, gives A. an estate tail. *Davie v. Stercens*, Dougl. 321; *Broadhurst v. Morris*, 2 B. & Ad. 1; *Wood v. Baron*, 1 East, 259; *Roper v. Roper*, L. R. 3 C. P. 32; 36 L. J. C. P. 27; 37 *ib.* 7. See, too, *Doe d. Gigg v. Bradley*, 16 East, 399.

Children used as a word of limitation.

In such cases children would seem to be a word of limitation

**Chap. XXIX.** quite independently of the so-called rule in *Wild's Case*, 6 Rep. 17.

Devise to A.  
and children  
in succession.

So a devise of all the testator's *property* to A. and his children in succession gives A. an estate tail. *Earl of Tyrone v. Marquis of Waterford*, 1 D. F. & J. 618; see *Snowball v. Proctor*, 2 Y. & C. C. 478.

Rule in  
*Wild's Case*.

2. A simple devise to A. and his children, where A. has no children at the time of the devise, gives him an estate tail. *Wild's Case*, 6 Rep. 17; *Clifford v. Koe*, 5 App. C. 447.

And for this purpose a child *en ventre* at the date of the will is considered as non-existent. *Roper v. Roper*, L. R. 3 C. P. 92.

Power to  
appoint the  
property to  
children is not  
inconsistent  
with an estate  
tail.

The rule applies, though the testator may expressly give the parent a power of appointing the property in question among his children. *Seale v. Barter*, 2 B. & P. 485; *Clifford v. Brooke*, 1 R. 10 C. L. 179; 2 L. R. Ir. 184; *S. C. nom. Clifford v. Koe*, 5 App. C. 447. See *In re Moyle's Estate*, 1 L. R. Ir. 155.

Exceptions.

3. There may, however, be an intention shown that the parent was not to take an estate tail.

Thus, in *Buffar v. Bradford*, 2 Atk. 220, the testator showed that he contemplated the mother and children as taking joint interests at a period subsequent to his death. And in *Grierc v. Grierc*, 4 Eq. 180, where there was a devise of a house to the testator's nieces and their children, and if they have not any over, a direction that the furniture was to go with the house was held sufficient to show that an estate tail could not have been intended.

If there are  
children living  
at the date of  
the devise  
children is  
*primâ facie*  
not a word of  
limitation.  
Contrary  
intention.

4. If there are any children living at the time of the devise, the term children is *primâ facie* not a word of limitation. *Byng v. Byng*, 10 H. L. 171; *Oates d. Hatterly v. Jackson*, 2 Str. 1172; *Jeffery v. Honeywood*, 4 Mad. 398.

But this rule bends to evidence of a contrary intention; thus, a direction that certain things are to go as heirlooms with the estate, is sufficient to rebut a joint tenancy, and to show that an estate tail was intended to be given. *Byng v. Byng*, 10 H. L. 171.

By analogy to the rule in *Wild's Case* a devise to A. and

his sons in tail male, and for want of such issue male over, where A. has no sons, gives him an estate tail. *Wharton v. Gresham*, 2 W. Bl. 1083; see *Sparling v. Parker*, 29 B. 450. Chap. XXIX.

A devise to A. and B. as tenants in common, and in their respective proportions to their children, or according to their wills, gives the fee to A. and B. with an executory devise at the death of each to his children or devisees. *Re Buckmaster's Estate*, 47 L. T. 514.

The rule in *Wild's Case* does not apply to personalty. *Audsley v. Horn*, 26 B. 195; 1 D. F. & J. 226.

The rule in *Wild's Case* does not apply to personalty.

#### IV. THE RULE IN SHELLEY'S CASE.

The construction of devises to heirs and heirs of the body, after a prior estate of freehold in the ancestor, is governed by the so-called rule in *Shelley's Case*, which is a rule of law and not of construction. *Van Grutten v. Foxwell*, (1897) A. C. 658 (for the subsequent litigation on this will see 78 L. T. 281; 79 L. T. 617; 82 L. T. 272).

It may be laid down generally, that where the ancestor by any will takes an estate of freehold, whether by implication or direct limitation, and whether it may or may not determine in his lifetime, and in the same will an estate is limited by way of remainder, either mediately or immediately, to his heirs or the heirs of his body, in such case the heirs are always words of limitation of the estate and not words of purchase, and therefore the ancestor takes an estate in fee or in tail as the case may be. *Shelley's Case*, 1 Rep. 98b; *Fearne*, C. R. 38, 40; *Pybus v. Mitford*, 1 Ventr. 372; *Curtis v. Price*, 12 Ves. 99.

The rule in *Shelley's Case* stated.

The two limitations must be in the same instrument, but the Court considers a will and codicils for this purpose as one instrument. *Hayes d. Foorde v. Foorde*, 2 W. Bl. 698.

If the ancestor, being the testator's heir, takes a particular estate of freehold only by way of resulting trust, it seems the rule does not apply. *Coape v. Arnold*, 4 D. M. & G. 574.

The rule applies equally to limitations of freehold and copyhold estates, and to estates *pur autre vie*. *Doe d. Jeff v.*

Chap. XXIX. *Robinson*, 8 B. & C. 296 ; 2 M. & Ryl. 249 ; see 2 D. & War 327 ; *Crozier v. Crozier*, 3 D. & War. 373.

It applies to limitations, which are both legal or both equitable, even where the first is for the separate use of a married woman. *Spence v. Spence*, 12 C. B. N. S. 199 ; *Fearne*, C. R. 56 ; *Pitt v. Jackson*, 2 B. C. C. 51.

It does not apply to cases, where one limitation is legal and the other equitable. *Right v. Creber*, 5 B. & C. 866 ; *Collier v. McBean*, 34 L. J. Ch. 555 ; 34 B. 426.

Where by will an equitable estate was given to the ancestor with a legal limitation to the heirs of his body, and by a codicil the land was devised to trustees upon trust to secure a jointure and pay certain debts so that the limitations of the will became all equitable, it was held that the trustees were bound, upon carrying out their trust, to reconvey the land to the uses of the will and that the rule did not apply. *Coape v. Arnold*, 4 D. M. & G. 574.

The rule does not apply so as to destroy intermediate contingent limitations by merger, even in cases before 8 & 9 Vict. c. 106. *Lewis Bowles' Case*, 11 Rep. 80 ; *Fearne*, C. R. 36.

Nor does it apply where the estate to the heirs is limited, not by way of remainder, but by way of executory devise. *Lloyd v. Carew*, Prec. Ch. 72 ; Show. P. C. 137 ; see *Fearne*, 275 ; *Plunket v. Holmes*, 1 Lev. 11 ; Raym. 28 ; *Fearne*, 341 ; *Crofts v. Middleton*, 2 K. & J. 194 ; 8 D. M. & G. 192 ; see *In re White & Hindle's Contract*, 7 Ch. D. 201 ; *Richardson v. Harrison*, 16 Q. B. D. 85.

Application of the rule where the limitation is to the heirs or the heirs of the body of the ancestor.

The rules of construction with reference to cases coming within the operation of the rule in *Shelley's Case* are settled by the leading cases of *Jesson v. Wright*, 2 Bl. 1 ; *Roddy v. Fitzgerald*, 6 H. L. 823 ; *Van Grutten v. Foxwell*, (18J7) A. C. 658.

A. Where the words heirs or heirs of the body are used in the limitation of the inheritance the rule applies—

1. Although the limitation of the freehold to the ancestor may be followed by words clearly indicating an intention that his estate is to be for life only.

Restrictions upon the estate of the

Thus, it is immaterial that the estate of the ancestor may be declared to be "for life and no longer:" *Roe d. Thong v.*

*Bedford*, 4 Mau. & S. 362; 1 B. C. C. 313; *Robinson v. Chap. XXIX.*  
*Robinson*, 1 Burr. 38; 3 B. P. C. 180; 2 Ves. Sen. 225; ancestor are  
*Macnamara v. Dillon*, 11 L. R. Ir. 29; that he is made immaterial.  
 unimpeachable for waste: *Jones v. Morgan*, 1 B. C. C. 206;  
*Bennett v. Earl of Tankerville*, 19 Ves. 170; that powers are  
 expressly given him which would be implied if he were tenant  
 in tail, such as powers to jointure and make leases: *King v.*  
*Melling*, 1 Vent. 225; *Baile v. Coleman*, 2 Vern. 668; *Jones v.*  
*Morgan*, 1 B. C. C. 206; *Broughton v. Langley*, 2 Ld. Raym.  
 873; that his estate is made subject to the obligation of  
 keeping the buildings in repair: *Jesson v. Wright*, 2 Bl. 1;  
 that there is a restraint upon alienation for longer than his  
 life: *Perrin v. Blake*, 1 W. Bl. 672; *Hayes d. Foorde v. Foorde*,  
 2 W. Bl. 698; that, where there is no executory trust, there  
 is a declaration that special care should be taken that it  
 should never be in the power of the ancestor to dock the  
 entail: *Leonard v. Earl of Sussex*, 2 Vern. 526; and that there  
 is a limitation to trustees to preserve contingent remainders.  
*Wright v. Pearson*, Amb. 358; 1 Ed. 119.

2. The rule applies, where words of limitation are superadded to the limitation to the heirs or heirs of the body, provided such words are not inconsistent with the nature of the descent pointed out by the first words, for such words may be looked upon as an explanation of what the testator supposed to be the course of the descent under an estate tail, and *expressio eorum quæ tacite insunt nihil operatur*.

Words of limitation superadded to the word heirs will not make it a word of purchase.

Thus, words limiting the estate of the heirs to a life estate, or to a life estate without power to sell or dispose, will be rejected. *Doe d. Elton v. Stenlake*, 12 East, 515; *Hugo v. Williams*, 14 Eq. 224; *Hayes d. Foorde v. Foorde*, 2 W. Bl. 698.

The same will be the case with words of limitation in fee or in tail, superadded to the word heir or heirs of the body.

Thus, a limitation to the heirs of the body of the ancestor and their heirs, or their heirs, executors, administrators, and assigns for ever (a); or to the heirs male of the body of the ancestor, and their issue (b); or to the heirs male of his body in tail, in strict settlement (c); or to the heirs male of his body, and the heirs male of the body of every such heir male

**Chap. XXIX.** severally and successively as they should be in priority of birth, every elder, and the heirs male of his body, to be preferred to every younger (*d*), will not avail to give the heirs an estate by purchase. *Morris d. Andrews v. Le Gay*, cited 2 Burr. 1103, and 8 T. R. 518; *Kinch v. Ward*, 2 S. & St. 409; *Measure v. Gee*, 5 B. & Ald. 910; *Nash v. Coates*, 8 B. & Ad. 839 (*a*); *Minshull v. Minshull*, 1 Atk. 411 (*b*); *Douglas v. Congreve*, 1 B. 59 (*c*); *Legatt v. Sewell*, 1 Eq. Ab. 395, p. 7; 1 P. W. 37; see *Fearne*, 159, 160; see *Fetherston v. Fetherston*, 8 Cl. & F. 67; 9 Bl. 237 (*d*).

Words of  
distribution  
superadded.

8. Words of distribution following the limitation of the inheritance will not prevent the application of the rule, "for it does not follow that a testator did not intend that heirs of the body should take because they could not take in the mode prescribed."

Thus, a declaration that the heirs are to take as tenants in common, and not as joint tenants (*a*); or equally among them, share and share alike (*b*); or in such shares and proportions as the ancestor should appoint (*c*); or "as well male as female," or "whether sons or daughters" as tenants in common (*d*), will not prevent the operation of the rule. *Doe d. Candler v. Smith*, 7 T. R. 531; *Bennett v. Earl of Tankerville*, 19 Ves. 170 (*a*); *Doe d. Atkinson v. Featherstone*, 1 B. & Ad. 944 (*b*); *Jesson v. Wright*, 2 Bl. 1; see *Roddy v. Fitzgerald*, 6 H. L. 823; *Dunk v. Fenner*, 2 R. & M. 557; *Van Grutten v. Foxwell*, (1897) A. C. 658 (*c*); *Doe d. Bosnall v. Harvey*, 4 B. & C. 610; *Pierson v. Vickers*, 5 East, 548 (*d*).

Gavelkind  
lands.

In such a case it makes no difference that the lands are gavelkind. *Doe d. Bosnall v. Harvey*, *supra*, overruling *Doe v. Laming*, 2 Burr. 1100.

The absence of a gift over in default of issue is immaterial. *Doe d. Atkinson v. Featherstone*, 1 B. & Ad. 944.

Words of dis-  
tribution and  
limitation  
superadded.

4. Nor will words of distribution and limitation together, superadded to the limitation of the inheritance, prevent the operation of the rule.

It has sometimes been laid down that words of distribution and limitation together, superadded to the heirs, would make the latter a word of purchase, but the rule is now clearly

settled, overruling *Gretton v. Haward*, 6 Taunt. 94; 2 Marsh. 9, and *Crump d. Woolley v. Norwood*, 7 Taunt. 362; 2 Marsh. 161; see *Anderson v. Anderson*, 30 B. 209; *Mills v. Seward*, 1 J. & H. 738; *Grimson v. Downing*, 4 Dr. 125; *Van Grutten v. Foxwell*, (1897) A. C. 658; and see *Jordan v. Adams*, 9 C. B. N. S. 483. Chap. XXIX.

The words heirs or heirs of the body will, however, be construed as words of purchase:—

1. When words of limitation are superadded to them inconsistent with the nature of the descent pointed out by the first words, as where the limitation is to a man for life, and after his decease to the use of his heirs and the heirs female of their bodies. *Fearne*, C. R. 182; *Shelley's Case*, 1 Rep. 88, 95b. Words of limitation inconsistent with the descent of an estate tail in the ancestor.

There appears to be no other authority for this rule than the argument of counsel in *Shelley's Case*, cited with approbation by *Fearne*, C. R. p. 182. It has, however, been followed in a case where the word issue and not heir was used. See *Hamilton v. West*, 10 Ir. Eq. 75. In that case the devise was to Margaret for life, remainder to her issue female and the heirs of their bodies; and it was held that Margaret took only a life estate, with remainder to her daughters in tail general, and there seems no reason for supposing, that the same principle would not be applied, where the word heirs instead of issue is used. See *Dodds v. Dodds*, 10 Ir. Ch. 476; 11 *ib.* 374.

In the absence of authority it is doubtful what amount of discrepancy between the two courses of descent will justify the application of this rule. *Fearne*, C. R. p. 188, points out that “there does not appear to be the same inconsistency in construing the first words, which describe heirs special, to be words of limitation, where the superadded words extend to heirs general, as there is where the first words, and those engrafted on them, distinguish two different incompatible courses of descent, and would not carry the estate to the same person; in the latter case it is absolutely impossible, by any implied qualification, to reconcile the superadded words to those preceding them, so as to satisfy both by construing the first as words of limitation; whereas, in the former case, the What is an inconsistent course of descent.

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superadded words are not contrary to or incompatible with the preceding, but in their general sense include them ; and there is no improbability in the supposition that they were used by the testator in the same qualified sense as the preceding ; and then both may be satisfied, by taking the first as words of limitation." In *Hamilton v. West*, however, the question was between an estate in tail female in the ancestor and an estate in tail general in the daughters, the latter of which would, "in their general sense," have included the former ; and it seems, therefore, that Fearn's remark must be taken with some modification.

The testator may interpret the sense in which he has used the word heirs.

2. Where the testator has, either by express words, or by implication, interpreted the meaning he intended to convey by the term heirs or heirs of the body, those words may be words of purchase.

In *Fetherston v. Fetherston*, 3 Cl. & F. 67, Lord Brougham lays down, "If there is a gift to A. and the heirs of his body, and then, in continuation, the testator, referring to what he had said, plainly tells us that he used the word heirs of the body to denote A.'s first or other sons, then clearly the first taker would only take a life estate."

Effect of the words "if more than one child, to such child."

However, the mere insertion of such words as, if more than one child, or, if only one child, then to such child, is not sufficient to show that the testator meant by heirs of the body, children. *Roddy v. Fitzgerald*, 6 H. L. 823 ; *Jesson v. Wright*, 2 Bl. 1.

Effect of the words "if more than one such child," &c.

And even if the words are, if there be but one *such* child, to such child, his or her heirs for ever, the term heirs of the body will not be held to mean children, if there are no words to carry the fee to them, except in the event of there being only one child. *Bridge v. Chapman*, Notes of Cases, L. J., July 10, 1875, 118 ; see *Ryan v. Cowley*, Ll. & G. t. Sug. 7.

But in similar cases heirs of the body will be construed as children, if there are words giving them an estate in fee or in tail. *Goodtitle d. Sweet v. Herring*, 1 East, 264 ; *Gummoe v. Howes*, 23 B. 184. In *Poole v. Poole*, 3 B. & P. 620, this construction was rebutted by other limitations.



So, if the testator, after using the words heirs of the body continues, "that is to say, the first, second, and other sons &c." *Lowe v. Davies*, 2 Ld. Raym. 1561. Chap. XXIX.  
Express interpretation clause.

Or again, the testator may explain his meaning by reference to other limitations. *Meredith v. Meredith*, 10 East, 508; *Doe d. Woodall v. Woodall*, 3 C. B. 349; *East v. Twyford*, 4 H. L. 517. Interpretation by reference.

And the words heirs of the body, coupled with a reference to the ancestor as their father, must mean children. *Jordan v. Adams*, 9 C. B. N. S. 483. Reference to father.

B. The application of the rule in *Shelley's Case* is the same, where the words are first heirs male or heirs of the body who shall attain twenty-one. *Minshull v. Minshull*, 1 Atk. 411; *Toller v. Attwood*, 15 Q. B. 929. First heirs male.

C. When the word heir is used in the singular, the rules of law are less stringent in uniting the limitation of the inheritance to the estate for life of the ancestor. Limitation to the heir of the tenant for life.

1. However, the word heir, in the singular, without words of limitation superadded, is a word of limitation and not of purchase, even when such words as "next" or "first" are added to it. *Blackburn v. Stables*, 2 V. & B. 367; *Burley's Case*, cit. 1 Vent. 230; *Whiting v. Wilkins*, 1 Bulst. 219; *Richards v. Lady Bergarennny*, 2 Vern. 324; *White v. Collins*, Com. Rep. 289; *Dubber d. Trollope v. Trollope*, Ambl. 453.

The fact that the limitation is to the heir for ever makes no difference. *Fuller v. Chamier*, L. R. 2 Eq. 682.

2. But words of limitation in fee or in tail, superadded to the word heir, make it a word of purchase. *Archer's Case*, 1 Rep. 66; *Fearne*, C. R. 150; *Clerke v. Day*, Moore, 598; *Willis v. Hiscor*, 4 M. & Cr. 197; *Greaves v. Simpson*, 12 W. R. 773; 10 Jur. N. S. 609. Words of limitation superadded to the word heir.

And even a devise to A. to hold to him and the heir male of his body, and the heirs and assigns of such heir male for ever, followed by a gift over, if A. died without leaving any son of his body, has been held to give A. a life estate only. *Chamberlayne v. Chamberlayne*, 6 E. & B. 625.

Where by deed land was conveyed to the use of A. during his life without impeachment of waste, with an ultimate

**Chap. XXIX.** limitation to the use of "such person or persons as at the decease of the said A. shall be his heir or heirs-at-law, and of the heirs and assigns of such person or persons," it was held that A.'s heir-at-law took by purchase. *Evans v. Evans*, (1892) 2 Ch. 178.

3. Where the estate of the heir is expressed to be for life, inasmuch as he is not to have the inheritance, he cannot take as heir by descent. *White v. Collins*, Com. 289; *Pedder v. Hunt*, 18 Q. B. D. 565.

The rule in *Shelley's Case* applies where the limitation is to the issue of a tenant for life.

D. The application of the rule in *Shelley's Case*, where the limitation is to the issue of the ancestor, who takes a prior estate of freehold:—

The word issue, whether used in a will before or since the Wills Act, is *primâ facie* a word of limitation; the rule in *Shelley's Case* applies, therefore, where the limitation in remainder is to the issue of the ancestor. *King v. Melling*, 1 Vent. 225; 2 Lev. 58; *Roddy v. Fitzgerald*, 6 H. L. 872; *Sandes v. Cooke*, 21 L. R. Ir. 445.

Distinction between the word issue and heirs.

But though this is the *primâ facie* meaning of issue, "the authorities clearly show that, whatever be the *primâ facie* meaning of the word issue, it will yield to the intention of the testator to be collected from the will, and that it requires a less demonstrative context to show such intention than the technical expression heirs of the body would do." Per Alderson, B., *Lees v. Mosley*, 1 Y. & C. Ex. 609.

Words of distribution alone superadded in cases before the Wills Act.

1. Words of distribution alone, superadded to the word issue, in cases where the issue would not take the inheritance, will not make it a word of purchase. *Doe d. Blandford v. Applin*, 4 T. R. 82; *Doe d. Cock v. Cooper*, 1 East, 229; *Roddy v. Fitzgerald*, 6 H. L. 823; *Colclough v. Colclough*, 1 R. 4 Eq. 268; *Woodhouse v. Herrick*, 1 K. & J. 352; *Blackhall v. Gibson*, 2 L. R. Ir. 49.

This is clear, when there is a gift over upon an indefinite failure of issue; but it seems, that a gift over is immaterial, since, under the old law, the issue, if they took as purchasers, could only take for life, and therefore the testator's general intent to benefit all the issue would fail. See per Wood, V.-C., in *Kavanagh v. Morland*, Kay, 16, 27, where the same

construction prevailed, although the gift over was in default of issue of the tenant for life living at his death ; and this is in accordance with *Doe d. Cannon v. Rucastle*, 8 C. B. 876. Chap. XXIX.

2. Words of limitation in fee or in tail, superadded to the word issue, where there is a limitation in default of issue in cases before the Wills Act, will not make it a word of purchase, provided they do not change the course of descent. *Roe d. Dodson v. Greer*, 2 Wils. 324 ; *Wilm.* 272 ; *Denn d. Webb v. Puckey*, 5 T. R. 299 ; *Frank v. Stovin*, 3 East, 548 ; *Griffiths v. Evan*, 5 B. 241. Words of limitation superadded.

The same rule applies where the gift over is on failure of issue living at the death of the person to whom the prior estate is limited, or on death of the issue under twenty-one. *Warren v. Travers*, 1 R. 2 Eq. 455 ; see *Fetherston v. Fetherston*, 3 Cl. & F. 67 ; 9 Bli. 237. *Merest v. James*, 1 B. & B. 484 ; 4 J. B. Moo. 327, must be considered overruled.

And the absence of a gift over in default of issue will not convert issue into a word of purchase. *Williams v. Williams*, 51 L. T. 779 ; see, too, *Doe d. Cooper v. Collis*, 4 T. R. 294 ; and the remarks of Wood, V.-C., Kay, 16, 27 ; and see *Montgomery v. Montgomery*, 3 J. & Lat. 47 ; *Morgan v. Thomas*, 8 Q. B. D. 575 ; 9 Q. B. D. 648. Effect of the absence of a gift over in default of issue.

3. If, however, the superadded words of limitation alter the course of descent, the issue will take as purchasers. *Hamilton v. West*, 10 Ir. Eq. 75 ; *Dodds v. Dodds*, 10 Ir. Ch. 476 ; 11 *ib.* 374, *ante*, pp. 379, 380.

4. Words of limitation in fee or in tail, and of distribution, superadded to the word issue, make it a word of purchase, whether there is a limitation over in default of issue or not. *Lees v. Mosley*, 1 Y. & C. Ex. 589 ; *Crozier v. Crozier*, 3 D. & War. 373 ; *Greenwood v. Rothwell*, 5 M. & Gr. 628 ; 6 Sc. N. R. 670 ; *Montgomery v. Montgomery*, 3 J. & Lat. 47 ; *Slater v. Dangerfield*, 15 M. & W. 263 ; *Colclough v. Colclough*, 1 R. 4 Eq. 263 ; *M'Kenna v. Eager*, 1 R. 9 C. L. 79 ; *Rotheram v. Rotheram*, 13 L. R. Ir. 429 ; *Shannon v. Good*, 15 L. R. Ir. 284. Words of limitation and distribution superadded make issue a word of purchase.

It makes no difference whether a fee be given to the issue by express words or by implication from a power of appointing

Chap. XXIX. to them. *Bradley v. Cartwright*, L. R. 2 C. P. 511; *Whitelaw v. Whitelaw*, 5 L. R. Ir. 120.

But a power of appointing to issue, which would authorise an appointment in fee, will not make the word issue a word of purchase, where there is an express gift to issue as tenants in common without words giving them the fee. *Blackhall v. Gibson*, 2 L. R. Ir. 49.

Devise to M.  
for life and her  
issue since  
Wills Act.

5. A devise to M. for her life and to her lawful begotten issue, in a will since the Wills Act, followed by a gift over in the event of her leaving none, gives M. an estate tail. *Sandes v. Cooke*, 21 L. R. Ir. 445.

Effect of a  
restraint upon  
alienation by  
the tenant for  
life and his  
issue or any of  
them.

6. In *King v. Burchell*, Amb. 379; 4 T. R. 226, n., a direction against alienation by the tenant for life and his issue, or any of them, was held to show that the word issue was used as a word of limitation. See, too, *Tate v. Clarke*, 1 B. 100.

## CHAPTER XXX.

### ESTATES OF TRUSTEES.

#### I. EFFECT OF LAND TRANSFER ACT.

By sect. 1 (1) of the Land Transfer Act, 1897 (60 & 61 Chap. XXX.  
 Vict. c. 65), which applies in the case of death after the Effect of Land  
 1st January, 1898, it is enacted that where real estate is vested Transfer Act.  
 in any person without a right in any other person to take by  
 survivorship, it shall on his death, notwithstanding any testa-  
 mentary disposition, devolve to and become vested in his personal  
 representatives or representative from time to time as if it were  
 a chattel real vesting in them or him.

The section applies to real estate over which a person  
 executes by will a general power of appointment as if it were  
 real estate vested in him, but real estate does not include land  
 of copyhold tenure or customary freehold in any case in which  
 an admission or any act by the lord of the manor is necessary  
 to perfect the title of a purchaser from the customary tenant.

Until a personal representative is constituted the land passes  
 to the heir and not to the devisees in trust under the will.  
*John v. John*, (1898) 2 Ch. 573.

In the case of executors the land vests in all those named Land vests in  
 by the will who have not disclaimed, whether they have proved all executors.  
 or not, and those who prove cannot alone make a title. *In re*  
*Pawley and London and Provincial Bank*, (1900) 1 Ch. 58.

The real estate is vested in the personal representative for  
 administrative purposes, and when they are satisfied he may  
 (sect. 3) assent to any devise in the will or may convey  
 the land to any person entitled thereto as heir, devisee or  
 otherwise.

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It is by no means clear what effect the Act will have upon devises to trustees to uses, whether, for instance, all the estates under the will become equitable. Possibly it may have none. Some light is thrown upon the question by *Coape v. Arnold* (4 D. M. & G. 574), where a devise by codicil to trustees for certain limited purposes was held in effect not to alter the effect of the devises in the will. The following statements made in this chapter must be taken subject to any alteration in the law made by the enactment referred to.

## II. IN WHAT CASES TRUSTEES TAKE THE LEGAL ESTATE.

Appointment  
of trustees of  
inheritance.

The appointment of certain persons as trustees of inheritance gives them the fee. *Trent v. Hanning*, 1 B. & P. N. R. 116; 7 East, 97; 10 Ves. 495; 1 Dow, 102.

So the appointment of a person as executor, "so far as is necessary to the performance of the trusts relating to my real estate," gives the executor the fee. *Plenty v. West*, 6 C. B. 201; 16 B. 175; *Sidebotham v. Watson*, 11 Ha. 170; see *Oates v. Cooke*, 3 Burr. 1684; *Doe d. Gillard v. Gillard*, 5 B. & Ald. 785.

If the land is devised to beneficiaries, and a share is directed to be divided on the death of a beneficiary, persons appointed to carry out all the intentions of the will will take the legal estate, though the case may be different where a sale is only contemplated as possible. *Davies to Jones and Evans*, 24 Ch. D. 190; *L. & S. W. R. Co. v. Bridger*, 12 W. R. 948.

Appointment  
of new trustee  
by codicil.

Where land is devised to three trustees, and the appointment of one of the trustees is revoked, and another is appointed in his place, the fee passes to the new trustee jointly with the two remaining trustees. *Re Hough's Will*, 4 De G. & S. 371; *Re Turner*, 30 L. J. Ch. 144; 9 W. R. 174; 2 D. F. & J. 527.

A direction to executors to let the testator's lands, and out of the profits to pay two sums, followed by a gift of the rents of the land, gives the executors no estate beyond the period for accomplishing the purpose indicated. *Lambert v. Browne*, 1 R. 5 C. L. 218. See *Smith v. Smith*, 1 L. R. Ir. 206.

A direction to executors to pay annuities out of the testator's whole estate, which is disposed of after payment of the annuities, gives the executors the fee. *Doe v. Woodhouse*, 4 T. R. 89; see *Jenkins v. Jenkins*, 1 Willes, 650. Chap. XXX.  
Direction to  
pay annuities  
out of realty.

### III. DEVISES TO USES.

The Statute of Uses was passed before the Statute of Devises, and therefore does not apply to wills; but devises of real estate are construed in the same way as if the Statute of Uses did apply. *Baker v. White*, 20 Eq. 166, p. 171; per Jessel, M.R. Operation  
of Statute  
of Uses.

Thus a devise unto and to the use of trustees leaves the legal estate in the trustees, whereas a devise to trustees upon trust for or to the use of a beneficiary vests the legal estate in the beneficiary. Devise to A.  
in trust for B.

The legal estate is not, however, executed in the beneficiary if it is wanted by the trustees for the purpose of their trust. Thus, if the devise is to trustees upon trust to pay the rents to A. for his life, the legal estate remains in the trustees during A.'s life (a). On the other hand, if the devise is to the trustees upon trust to permit A. to receive the rents during his life, A. takes the legal estate (b). If the trust is to pay to or permit A. to receive the rents the later words prevail, and A. takes the legal estate (c). *Doe v. Homfray*, 6 A. & E. 206 (a); *Right d. Phillips v. Smith*, 12 East, 455; *Doe d. Noble v. Bolton*, 11 A. & E. 188 (b); *Doe v. Biggs*, 2 Taunt. 109; *Baker v. White*, 20 Eq. 166; *Re Allsop and Joy's Contract*, 61 L. T. 213; *In re Adams and Perry's Contract*, (1899) 1 Ch. 554 (c); see *In re Lashmar*; *Moody v. Penfold*, (1891) 1 Ch. 258. Trustees  
retain legal  
estate so far as  
wanted for  
their trust.

If the beneficiary is to receive only the clear or net rents (a), or he is to receive the rents with the approbation of the trustees (b), the legal estate is not executed in him. *White v. Parker*, 1 Bing. N. C. 573; 1 Sc. 542; *Barker v. Greenwood*, 4 M. & W. 421 (a); *Gregory v. Henderson*, 4 Taunt. 772 (b).

In the same way if the trustees are to preserve contingent remainders during the life of a tenant for life a trust to permit him to receive the rents does not execute the use in him. *Biscoe v. Perkins*, 1 V. & B. 485. Trustees to  
preserve.

**Chap. XXX.****Power to  
give receipts.**

Again, a power to the trustees to give receipts if the only property to which it can apply is freehold property devised to uses would show that the trustees were to retain the legal estate, though this is not so if there are copyholds to which the power can apply. *Baker v. White*, 20 Eq. 166.

**Separate use.**

If the trust is for a married woman for her separate use, the legal estate remains in the trustees, but a separate use in a deed will not have this effect. *Harton v. Harton*, 7 T. R. 652; *In re Hart's Estate*; *Orford v. Hart*, W. N. 1883, 164; *Williams v. Waters*, 14 M. & W. 166.

**Power of  
maintenance.**

If there is a devise in remainder to children who shall attain twenty-one, a power of maintenance given to the trustees will prevent the use in remainder from becoming legal. *Berry v. Berry*, 7 Ch. D. 657; *In re Tanqueray-Willauime and Landau*, 20 Ch. D. 465; see *In re Bourne*; *Rymer v. Harpley*, 56 L. J. Ch. 566; 56 L. T. 388; 35 W. R. 359.

**Unprotected  
contingent  
remainders.**

Where there is devise to trustees and their heirs to uses the fact that there are contingent remainders in the will which are unprotected is not enough to show that the legal estate was to remain in the trustees. *Cunliffe v. Brancker*, 3 Ch. D. 393; see *Doe v. Willan*, 2 B. & Ald. 84; *Houston v. Hughes*, 6 B. & C. 403.

**Recurring  
powers  
requiring  
legal estate.**

Where there are recurring occasions for the exercise of active duties by the trustees and no repeated devises to them to enable them to perform their duties, the legal estate if once in the trustees is to be deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would, but for the recurring duties, be construed as uses executed in the beneficiaries. *Harton v. Harton*, 7 T. R. 652; *Brown v. Whiteway*, 8 Ha. 145; *Toller v. Attwood*, 15 Q. B. 951; *Van Grutten v. Foxwell*, (1897) A. C. 658.

**Power to sell.**

A power to sell, or convey, or mortgage the real estate will prevent the use from being executed in beneficiaries as regards all limitations which are subject to the power. *Bagshaw v. Spencer*, 1 Ves. Sen. 142; 2 Atk. 570; *Rackham v. Siddall*, 1 Mac. & G. 607; *Doe d. Shelley v. Edlin*, 4 A. & E. 582; *Watson v. Pearson*, 2 Ex. 581; *Blaggrave v. Blaggrave*, 4 Ex. 550; *Cropton v. Davies*, L. R. 4 C. P. 159; *Richardson v.*



*Harrison*, 16 Q. B. D. 85 ; *In re Lashmar : Moody v. Penfold*, Chap. XXX. (1891) 1 Ch. 258.

Where all the limitations are to uses so as to give legal estates, a power to sell and convey, not by conveyance of the legal estate but by revoking the old and limiting new uses, shows that the trustees were not to take a legal estate. *Cunliffe v. Brancker*, 3 Ch. D. 898.

Power to  
revoke uses.

A devise subject to a charge of debts to trustees upon whom the duty is not imposed of paying them will not prevent the legal estate from passing to the beneficiary (a). But if the land is charged with debts and devised to trustees who are also appointed executors inasmuch as it is their duty to pay the debts, the legal estate remains in them (b). *Kenrick v. Lord Beauclerk*, 3 B. & P. 175 ; *Jones v. Lord Say*, 8 Vin. 262, pl. 19 ; *In re Adams and Perry's Contract*, (1899) 1 Ch. 554 (a) ; *Creton v. Creton*, 3 Sm. & G. 386 ; *Smith v. Smith*, 11 C. B. N. S. 121 ; *Spence v. Spence*, 12 C. B. N. S. 199 ; *Marshall v. Gingell*, 21 Ch. D. 790 ; *In re Brooke ; Brooke v. Brooke*, (1894) 1 Ch. 43 (b).

Devise subject  
to and upon  
trust to pay  
debts.

A devise upon trust to pay debts and legacies vests the legal estate in the trustees, whether the personal estate is or is not sufficient to pay the debts and legacies. *Murthwaite v. Jenkinson*, 2 B. & C. 357 ; 3 D. & Ry. 765 ; see *Doe d. Cadogan v. Ewart*, 7 A. & E. 686, p. 668.

The Statute of Uses does not apply to leaseholds for years or to copyholds, and therefore a devise of copyholds to A., in trust for B., gives A. the legal estate. *Houston v. Hughes*, 6 B. & C. 403 ; *Baker v. White*, 20 Eq. 166.

Leaseholds  
for years and  
copyholds are  
not within the  
Statute of  
Uses.

There is no so-called doctrine of attraction by which, where freeholds and copyholds are given together, the legal estate in the freeholds attracts the legal estate in the copyholds, or *vice versâ*. *Baker v. White*, 20 Eq. 166 ; overruling *Baker v. Parson*, 42 L. J. Ch. 228.

An appointment, under a power to appoint the use, vests the legal estate in the appointee. 2 Jarman, 1157.

## Chap. XXX.

## IV. WHEN ESTATE OF TRUSTEES CUT DOWN.

When fee  
simple cut  
down to a  
smaller estate.

The question dealt with in the last sub-division of this chapter has been how far under a devise to trustees in fee to uses the use is to be considered executed in the beneficiary, or how far the legal estate remains in the trustees.

It is a different question whether, where there is a devise to trustees in fee which vests in them the legal estate, their estate in fee is to be cut down to a smaller estate. In determining this question no distinction can be drawn between freeholds, copyholds, and leaseholds. *Doe v. Barthrop*, 5 Taunt. 382; *Baker v. White*, 20 Eq. 166; *Sterenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81; see *Wyman v. Carter*, 12 Eq. 309.

General rule.

The general rule is that where you find words of devise to trustees and their heirs then those words are to have their full natural effect as giving an estate of inheritance to the trustees unless something is found on the face of the will which cuts that estate down in some determinate event. *Doe v. Davies*, 1 Q. B. 430; *Poad v. Wilson*, 6 E. & B. 606; *Collier v. Walters*, 17 Eq. 252; *In re Townsend's Contract*, (1895) 1 Ch. 716.

Estate of  
trustees to  
preserve.

In several cases enough has been found in the will to cut down the estate of trustees to preserve contingent remainders when limited to them in fee to an estate to endure during the life of the tenant for life, where there were no subsequent remainders to preserve (a), and no power of appointment under which subsequent remainders might be created (b). *Doe d. Compere v. Hicks*, 7 T. R. 433; *Haddelsey v. Adams*, 22 B. 266; see *Saunders v. Eppe*, 9 W. R. 69 (a); *Venables v. Morris*, 7 T. R. 342, 437 (b).

In a deed as a general rule a limitation to the use of trustees in fee, will not be cut down to a smaller estate. *Wykham v. Wykham*, 18 Ves. 395; *Cooper v. Kynock*, 7 Ch. 398.

However, it has been held that a limitation in fee to trustees to preserve contingent remainders will, even in a deed, be cut down to an estate *pur autre vie*, if there is a subsequent limitation of a term to the same trustees. *Curtis v. Price*, 12 Ves. 89; *Beaumont v. Marquis of Salisbury*, 19 B. 198.

But a subsequent limitation in fee to the same trustees, and a grant of a term to other persons, will not cut down the estate of the trustees. *Colmore v. Tyndall*, 2 Y. & J. 605; *Lewis v. Rees*, 3 K. & J. 132; see *Fowler v. Lightburne*, 11 Ir. Ch. 495.

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In the same way if the trustees have duties to perform only during the life of a beneficiary, their estate will be limited to that life (a). and this construction is assisted if the devise in remainder is an independent devise (b). *Doe d. Woodcock v. Barthrop*, 5 Taunt. 382; *Playford v. Hoare*, 3 Y. & J. 175 (a); *Adams v. Adams*, 6 Q. B. 860; *Cooke v. Blake*, 1 Ex. 220 (b).

Estate limited by duty.

If the trustees must take an estate during the life of a beneficiary and they may require an estate for an indefinite period beyond the life; for instance, if the trustees are to stand seised during the life of A. and also until the testator's debts are paid (a), or if there is an indefinite power of leasing (b), the fee simple will not be cut down. *Collier v. Walters*, 17 Eq. 252, overruling *Collier v. McBean*, 34 B. 426 (a); *Doe d. Tomkyns v. Willan*, 2 B. & Ald. 84; *Doe d. Keen v. Walbank*, 2 B. & Ad. 554; *Riley v. Garnett*, 3 De G. & S. 629; see *Doe d. Kimber v. Cafe*, 7 Ex. 675 (b).

Where trustees take estate for a life and an uncertain period beyond.

A devise to trustees in fee upon trust to pay an annuity to A. for life will not be cut down to an estate for A.'s life, as the trustees may have to raise arrears after the annuitant's death. *Fenwick v. Potts*, 8 D. M. & G. 506; *Whittemore v. Whittemore*, 38 L. J. Ch. 17.

## V. EFFECT OF WILLS ACT.

In cases before the Wills Act a devise to trustees in words, that did not carry the fee, upon trust to pay debts, or make certain specified payments out of the rents, only gave them a chattel interest till the payments were made. *Cordall's Case*, Cro. El. 316; *Doe v. Simpson*, 5 East, 162; *Ackland v. Lutley*, 9 A. & E. 879; *Heardson v. Williamson*, 1 Kee. 33.

Devise to trustees without words of limitation upon trust to pay debts before the Wills Act.

So where the trustees were to pay annuities, and then

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Sects. 30  
and 31 of  
the Wills Act.

a specified sum out of the rents and profits, they took an estate for the lives of the annuitants with a chattel interest superadded. *Doe d. White v. Simpson*, 5 East, 162.

The law, however, on this point has been altered by sects. 30 and 31 of the Wills Act, which provide:—

30. "When any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

31. "Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

Effect of  
these sections  
according to  
Mr. Jarman.

The short effect of these obscure sections as stated by Jarman, and adopted by most of the writers who have followed him, is, "that trustees whose estate is not expressly defined by the will, must in every case, and whatever be the nature of the duty imposed on them, take either an estate for life or an estate in fee." 2 Jarm. 1166; see Shelford, Real Property Stat. 482; Lewin on Trusts, 10th ed. 235.

## CHAPTER XXXI.

## ON CERTAIN POWERS COMMONLY INSERTED IN WILLS.

A POWER of sale and exchange authorises a partition. *In re Frith & Osborne*, 3 Ch. D. 618. Chap. XXXI.

A power of or trust for sale will not as a general rule authorise a mortgage, though it may, if the object of the sale is to raise a particular charge, subject to which the estate is devised. *Stroughill v. Anstey*, 1 D. M. & G. 685; *Page v. Cooper*, 16 B. 396; *Walker v. Southall*, 56 L. T. 882.

I. Powers of  
sale.  
Mortgage.

A devise of real and personal estate upon trust to invest the same in certain securities has been held to give an implied power of sale over the real estate. *Affleck v. James*, 17 Sim. 121; *Mower v. Orr*, 7 Ha. 473; *Cornick v. Pearce*, 7 Ha. 477.

Trust to  
invest.

But a power to invest will not have this effect. *Re Holloway*; *Holloway v. Holloway*, 60 L. T. 46.

A direction to divide real and personal estate into moieties does not alone give an implied power of sale. *Cornick v. Pearce*, 7 Ha. 477.

Direction  
to divide.

An ordinary power of sale does not authorise the severance of the timber or minerals from the land. *Cholmeley v. Paxton*, 3 Bing. 207; S. C. nom. *Cockerell v. Cholmeley*, 10 B. & C. 564; 3 Russ. 565; 1 R. & M. 418; 6 Bl. N. S. 120; 1 Cl. & F. 60; *Buckley v. Howell*, 29 B. 546.

Severance of  
minerals.

The Trustee Act, 1893 (56 & 57 Vict. c. 53), sect. 44, gives the Court jurisdiction in the case of trustees authorised to dispose of land by way of sale, exchange, or partition, to sanction sales with an exception or reservation of any minerals.

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Whether  
power of sale  
extends to  
purchased  
lands.

Where there was a power to sell trust funds and invest them in the purchase of land, to be held on such trusts as would best correspond with those then subsisting, with a direction that land purchased should be considered personalty, it was held that the power of sale extended to purchased lands. *Tait v. Lathbury*, 1 Eq. 174; 35 B. 112.

Power of sale  
at death of  
tenant for  
life.

A power of sale to be exercised after the death of a tenant for life cannot be exercised during his life, though he may consent to the sale. *Blacklow v. Laws*, 2 Ha. 40; *Johnstone v. Baber*, 8 B. 238; *Mosley v. Hide*, 17 Q. B. 91; *Want v. Stallibrass*, L. R. 8 Ex. 175.

Sale within  
given period.

A direction to sell within five years has been held to be directory merely where the purchase money was to be applied in payment of debts. *Pearce v. Gardner*, 10 Ha. 287; see *Cuff v. Hall*, 1 Jur. N. S. 972.

Surviving  
trustee can  
sell.

Where land is devised to several trustees in fee upon trust to sell, the survivors can sell; and it is not necessary to fill up the number of trustees in order to make a good title. *Lane v. Debenham*, 11 Ha. 192.

Similarly if one trustee disclaims the others can sell. *Nicloson v. Wordsworth*, 2 Sw. 365; *Adams v. Taunton*, 5 Mad. 435; see *Crewe v. Dicken*, 4 Ves. 67.

Trust and  
power.

There is an important distinction between a power coupled with an interest and a bare power.

Thus a devise to executors to sell passes the interest, but a devise that executors shall sell the land, or that land shall be sold by them, gives them but a power. *Howell v. Barnes*, Cro. Car. 382; *Yates v. Compton*, 2 P. W. 308; *Lancaster v. Thornton*, 2 Burr. 1027; *Doe v. Shotter*, 8 A. & E. 905; see *Knocker v. Bunbury*, 6 Bing. N. C. 306; *Lambert v. Browne*, I. R. 5 C. L. 218.

Direction to  
executors  
to sell.

A direction to the testator's executors to sell his lands gives the executors a common law authority under which they can vest the legal estate in a purchaser without the concurrence of the heir. Co. Litt. 112b.

If the lands are devised by the will subject to the direction, it would seem the concurrence of the beneficiaries in the sale

would be no more necessary than the concurrence of the heir, Chap. XXXI.  
if the land is not devised.

The proper form of conveyance in such a case appears to be a bargain and sale which will not require to be enrolled under 27 Hen. VIII. c. 16, as it takes effect at common law and not under the Statute of Uses.

If the testator directs copyholds to be sold, or to be sold and conveyed, the purchaser is entitled to be admitted without the previous admittance either of the trustees or the heir. *Holder v. Preston*, 2 Wils. 400; *R. v. Wilson*, 11 W. R. 70; 3 B. & S. 201. Direction to  
sell copyholds.

The same principle applies if the copyholds are devised to the trustees subject to the power. *Glass v. Richardson*, 9 Ha. 698; 2 D. M. & G. 658.

The statute 21 Hen. VIII. c. 4, enacts in effect, that if any of the executors refuse to undertake the administration and charge of the will, the executors or executor accepting the charge may sell under a direction to the executors to sell the land. Acting  
executors  
may sell.

Copyholds are within the statute. *Peppercorn v. Wayman*, 5 De G. & S. 230.

The Trustee Act, 1893 (56 & 57 Vict. c. 53), sect. 22, provides that where a power or trust is given to or vested in two or more trustees, the same may be exercised or performed by the survivors or survivor. Survival of  
powers and  
trusts.

The section applies only to trusts constituted after or created by instruments coming into operation after the 31st December, 1881.

Sect. 50 provides that the expressions trust and trustee shall include the duties incident to the office of personal representative of a deceased person. Sect. 22 therefore extends to executors.

Sect. 6 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), enables a person to whom any power, whether coupled with an interest or not, is given, by deed to disclaim the power, and on such disclaimer the power may be exercised by the other or others or the survivors or survivor of the others of the persons to whom the power is given, unless a contrary intention is expressed in the instrument creating the power. See *In re Fisher*, 13 L. R. Ir. 546. Conveyancing  
Act, 1882,  
s. 6.

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The section applies to powers created by instruments coming into operation before or after the commencement of the Act.

A power coupled with a duty cannot be released or disclaimed either under this Act or otherwise. *Re Eyre; Eyre v. Eyre*, 49 L. T. 259; *Weller v. Ker*, L. R. 1 H. L. Sc. 11.

Sale by  
administrator.

A power of sale given to the testator's executors or administrators may be exercised by his administrator *durante minore ætate*. *Monseil v. Armstrong*, 14 Eq. 423.

Bare power  
does not  
survive.

It appears to be settled that a bare power of sale given to several persons *nominatim* cannot be exercised by the survivors. Co. Lit. 118a, note by Hargrave.

Whether  
power is given  
to executor as  
such or not.

Sect. 22 of the Trustee Act, 1893, applies only to powers and trusts vested in trustees and executors. It is a question of construction upon the will whether a power or trust is vested in a person who is appointed trustee or executor in that capacity, or whether it is given to him on personal grounds independently of his office.

It is settled that a power of sale given to "my executors hereinafter named" is given to them as executors. It can therefore be exercised by those for the time being holding the office, but not by a disclaiming executor. *Houell v. Barnes*, Cro. Car. 382; W. Jo. 352; *Yates v. Compton*, 2 P. W. 308; *Byam v. Byam*, 19 B. 58; *Brassey v. Chalmers*, 4 D. M. & G. 528; *Crawford v. Forshaw*, (1891) 2 Ch. 261. See *Keates v. Burton*, 14 Ves. 484; *In re Cooke's Contract*, 4 Ch. D. 454.

Whether a power given to "my executor A." is given to him as executor or not, must depend on the nature of the power and on the general language of the will. A power of sale so given has been held to be exercisable by the person irrespective of the office, while a power to distribute a fund for charitable purposes was held given in respect of the office. *Madden v. Madden*, 23 L. R. Ir. 167; *A.-G. v. Fletcher*, 5 L. J. Ch. 75.

Survivors of a  
class may sell.

It would seem, that where there is a direction that the lands shall in certain events be sold by a class of persons such as the testator's sons, the power can be exercised by the surviving sons, though some have died after the testator's death. *Vincent v. Lee*, Cro. Eliz. 26.



A power of sale given to executors, the object of the sale not being payment of debts, cannot be exercised by an executor of an executor. Yearbooks, 19 Hen. VIII. fo. 9 a, pl. 4 ; Chance on Powers, 250.

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Executor of executor cannot sell.

It has been held that a bare power to sell given to trustees and their heirs can be exercised by the surviving trustees and the heir of a deceased trustee jointly, but not by survivors of the trustees only. *Mansell v. Vaughan*, Wilm. 51 ; *Townsend v. Wilson*, 1 B. & Ald. 608 ; 3 Mad. 261. See *Hall v. Dewes*, Jac. 189.

Bare power to trustees and their heirs.

Where property was devised to trustees and their heirs on trust to sell, and the last surviving trustee died intestate, his heir could sell. *In re Morton & Hallett*, 15 Ch. D. 148.

Devolution of trust for sale.

And it has been held that the devisee of trust estates of the last surviving trustee can also sell in such case. *Osborne to Rowlett*, 13 Ch. D. 774.

Since the Conveyancing Act the personal representatives of the last surviving trustee are the persons to exercise the trust for sale, except in the case of copyholds. *In re Pirton and Tong's Contract*, 46 W. R. 187. See *ante*, p. 201.

But where the devise is to trustees without words of limitation upon trust that they or the survivor shall sell, the representatives of the survivor cannot exercise the trust for sale. *In re Ingleby Boak*, 13 L. R. Ir. 326.

Where the consent of a tenant for life is required, an infant tenant for life may consent if there is an intention shown that the power should be exercisable during minority ; for instance, if the power is to be exercised with the consent of a named person who was an infant at the time. *In re Cardross' Settlement*, 7 Ch. D. 728.

Whether infant can consent.

If the consent of the tenant for life is required, he may give his consent, though he has aliened his life estate, if his alienee concurs. *Alexander v. Mills*, 6 Ch. 124.

Tenant for life may consent after alienation.

In the event of the bankruptcy of the tenant for life, the power of sale may be exercised with the consent of the tenant for life and his trustee in bankruptcy. *Holdsworth v. Goose*, 29 B. 111 ; *Eisdale v. Hammersly*, 31 B. 255 ; *In re Cooper* ; *Cooper v. Slight*, 27 Ch. D. 565 ; *In re Bedingfield and*

Bankruptcy of tenant for life.

**Chap. XXXI.** *Herring's Contract*, (1898) 2 Ch. 382; see, too, *Hardaker v. Moorhouse*, 26 Ch. D. 417.

Reservation  
of power of  
consent.

If the tenant for life upon the alienation of his life estate has expressly reserved his right to consent to the sale, the concurrence of the alienee of the life estate is not necessary. *Warburton v. Farn*, 16 Sim. 625.

Power of sale  
with consent.

Where trustees were authorised to sell with the consent of the tenant for life for the time being and to invest the proceeds, and there was a direction that no investment should be made while there should be a tenant for life or tenant in tail of full age without his consent, it was held that the trustees might sell during the minority of a tenant in tail without his consent. *In re Neave's Estates*, 28 W. R. 976; 49 L. J. Ch. 642.

Where the power of sale was exercisable with the consent of any tenant for life entitled to the possession of the estates, and the testator created a term upon trust to pay the rents of all his estates to his wife during her widowhood and in the event of her marriage upon trust to pay her an annuity, it was held that the trustees might sell with the consent of the tenant for life and widow. *Robertson v. Walker*, 44 L. J. Ch. 220.

Whether  
survivors of a  
class can  
consent.

Where the power was not to be exercised over any part of the property without the consent of the testator's "sons and daughters also," who were tenants for life, it was considered doubtful whether the power could be exercised after the death of a daughter. *Sykes v. Sheard*, 33 B. 114; 2 D. J. & S. 6; see *Jefferys v. Marshall*, 19 W. R. 94.

Power of sale  
over reversion.

It appears to be clear, that where a reversion is settled for life with remainders, and a power of sale is given to trustees, the power of sale may be exercised before the property falls into possession. *Clark v. Seymour*, 7 Sim. 67; *Blackwood v. Borrowes*, 4 Dru. & War. 441, 468.

If the reversion subject to the life interest of A. is only to be sold with the consent of the person in possession under the will, the property may be sold if A. surrenders his life interest to the person entitled under the will. *Truell v. Tysson*, 21 B. 437; see *Giles v. Horner*, 15 Sim. 359.

A trustee for sale cannot contract to sell at a future time at a price now fixed. *Clay v. Rufford*, 5 De G. & S. 768. Chap. XXXI.

Trustees with a power of sale may join with the owner of another property in selling both properties, if such a mode of sale is beneficial; but the purchase-money must be apportioned before the completion of the purchase. *Cavendish v. Cavendish*, 10 Ch. 319; *Morris v. Debenham*, 2 Ch. D. 540; *In re Cooper & Allen*, 4 Ch. D. 802, where *Rede v. Oakes*, 4 D. J. & S. 505, is explained. Sale at a future date.  
Sale of several properties together.

Where the instrument expressly fixes a period within the bounds of perpetuity during which a power of sale may be exercised, the power is exercisable during the period though the property has vested in persons absolutely entitled so long as they have taken no steps to put an end to the power. *In re Cotton's Trustees*, 19 Ch. D. 624. How long a power of sale is exercisable.

In the same way where property is given to absolute owners free from disability, whether immediately or on the death of a tenant for life, and a power of sale for the purpose of division is given to trustees, this power is valid and exercisable within a reasonable time after it arises. *Peters v. Lewes & East Grinstead Ry Co.*, 18 Ch. D. 429; *In re Cooke's Contract*, 4 Ch. D. 454; see *In re Dyson & Fowke*, (1896) 2 Ch. 721.

But in the ordinary case of a power of sale given to trustees without any express limit of time, so that it is necessary to find some limit to save the power from invalidity on the ground of perpetuity, the power is spent when the settlement is at an end, that is to say, when all the interests have vested absolutely in possession. *Lantsbery v. Collier*, 2 K. & J. 718; *Woolley v. Jenkins*, 23 B. 53, affirmed 3 Jur. N. S. 321; *Peters v. Lewes & East Grinstead Ry Co.*, 18 Ch. D. 429. When power of sale at an end.

For the purpose of determining, whether the interests have become absolutely vested, limitations created under a special power of appointment are to be considered as if they had been inserted in the original instrument. *In re Brown's Settlement*, 10 Eq. 349. Limitations created under special power.

The fact that a jointure secured by a term remains charged, and that the widow has power to charge a sum of money on Existence of jointure.

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Vesting of  
one moiety.

the estate, will not keep the power of sale alive. *Woolley v. Jenkins*, 23 B. 53; *Wheate v. Hall*, 17 Ves. 86.

If the property is devised in moieties, the fact that the trusts of one moiety have come to an end will not put an end to the power of sale, if the trusts of the other moiety are subsisting, unless the power is limited to property subject to continuing trusts. *Trower v. Knightley*, 6 Mad. 134; *Wood v. White*, 4 M. & Cr. 460.

Trust for sale  
not spent by  
vesting in  
possession.

In the case of a trust for sale, it has been held that the trust may be exercised without the concurrence of the beneficiaries, though the last tenant for life has been dead six years and all the beneficiaries are *sui juris*. *In re Tweedie and Miles' Contract*, 27 Ch. D. 315.

In this case the trust was exercised within twenty-one years after the death of the last tenant for life. But if the trust does not come to an end when the interests are vested in possession, it would seem that it may be exercised at any time unless the delay in exercising the trust has been "unreasonable"—a matter not easy to determine. In *Tweedie and Miles* six years was held not an unreasonable delay.

As to a settlement keeping alive the powers of an earlier settlement, see *In re Wright's Trustees and Marshall*, 28 Ch. D. 93.

Power to sell  
land bought  
without  
authority.

If trustees have invested trust funds in land without any authority, they can make a good title to a purchaser if one of the beneficiaries concurs, inasmuch as one beneficiary is entitled to have the estate sold. *In re Patten*, 52 L. J. Ch. 787.

Power to sell  
for satisfied  
purpose.

A power of selling for a particular purpose only, such as payment of debts, is, of course, at an end if the purpose is satisfied. *Carlyon v. Truscott*, 20 Eq. 348.

Whether  
trust for sale  
prevents sale  
in partition  
action.

It has been held that where there is a discretionary trust for sale subsisting the Court will not make a decree for partition or sale. *Biggs v. Peacock*, 22 Ch. D. 284.

But this principle does not apply to the case of a simple power of sale. *Re Norris*, W. N. 1883, pp. 35, 65; *Boyd v. Allen*, 24 Ch. D. 622.

Persons to  
exercise power  
not named.

A difficulty sometimes arises, where there is a direction to sell the testator's land, but the persons to carry out the sale are not mentioned.

In such cases, if the purpose of the sale is to pay debts, the executor is the person to sell. *Anon.*, 3 Dyer, 371b; *Blatch v. Wilder*, 1 Atk. 420; *Forbes v. Peacock*, 11 M. & W. 630; see *Hooper v. Strutton*, 12 W. R. 367.

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Executors may sell if object of sale is to pay debts.

The same is the case if the proceeds of sale are to be divided with the personalty in certain shares, though there may be no charge of debts. *Tylden v. Hyde*, 2 S. & St. 238; *Ward v. Deron*, cit. 11 Sim. 160; *Forbes v. Peacock*, 11 M. & W. 630; 1 Ph. 717.

Proceeds of sale mixed with personalty.

But a mere direction to sell lands and divide the proceeds, where they are not mixed with the personalty, or a direction in certain events to sell lands which are directly devised, gives the executors no power of sale. *Bentham v. Wiltshire*, 4 Mad. 44; *Patton v. Randall*, 1 J. & W. 189; *Allum v. Fryer*, 3 Q. B. 442; *Curtis v. Fulbrook*, 8 Ha. 25, 278; *Haydon v. Wood*, ib. 279. See, however, *Lockton v. Lockton*, 1 Ch. C. 179.

Direction to sell and divide.

Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), sect. 2 (2), the personal representatives have the same powers as regards the real estate as if it were a chattel real vesting in them, except that some or one only of several joint personal representatives may not, without the authority of the Court, sell or transfer real estate.

Land Transfer Act.

The question, whether a charge of debts on land gives the executors a power of sale had become of small importance by virtue of Lord St. Leonards' Act (22 & 23 Vict. c. 35), sects. 14—18, which applies to wills coming into operation after the 13th August, 1859, and its importance has been still further diminished by the Land Transfer Act.

Power of sale implied from charge of debts.

Sects. 14—16 of Lord St. Leonards' Act in effect enact, that devisees in trust of the testator's whole interest in real estate charged with debts or legacies, no provision being made for the raising such debts or legacies, may raise the same by sale or mortgage, and where the estate subject to the charge is not devised to trustees for the testator's whole interest, the executors have a similar power of raising the amount. See *In re Adams & Perry's Contract*, (1899) 1 Ch. 554.

Lord St. Leonards' Act, sects. 14, 16 and 18.

Sect. 16 does not enable an administrator to sell. *In re Clay & Tetley*, 16 Ch. D. 3.

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Sect. 18 declares that the said sections of the Act shall not extend to a (beneficial) devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage, as he or they may by law now do.

Sect. 18 does not apply where an estate is devised by way of settlement. *Re Wilson; Pennington v. Payne*, 54 L. T. 600; 34 W. R. 512.

Wills not within the Act.

Devise to trustees of land subject to a general charge of debts.

In cases where Lord St. Leonards' Act did not apply the law was not in a very satisfactory state.

1. Where debts and legacies were charged on land, and the land was devised to trustees upon trusts not including the payment of debts, the trustees and not the executors were apparently the persons to sell and receive the purchase-money. *Shaw v. Borrer*, 1 Kee. 559; *Ball v. Harris*, 4 M. & Cr. 264; *Stroughill v. Anstey*, 1 D. M. & G. 647; *Sabin v. Heape*, 27 B. 553; *Hodkinson v. Quinn*, 1 J. & H. 303.

In such a case the fact that the trustees took only an estate *pur autre vie*, the use in remainder being executed by the effect of the Statute of Uses, did not affect their power to sell in order to raise the charge. *Eidsforth v. Armstead*, 2 K. & J. 383.

Beneficial devise subject to debts to a person who is also executor.

2. When there was a charge of debts and legacies on land, and the land was devised beneficially, expressly subject to the charge, to a person, who was one of several executors, he could sell and pass the legal estate. *Colyer v. Finch*, 5 H. L. 905; *Johnson v. Kennett*, 8 M. & K. 624; *Corser v. Cartwright*, 8 Ch. 971; L. R. 7 H. L. 731.

Devise to person not executor.

3. Where there was a charge of debts and legacies on land which was given to a devisee for his own use or as to which the testator died intestate, the better opinion appears to be that the executor could not, but the devisee or heir could alone give a good title. *Doe v. Hughes*, 6 Ex. 223; *Johnson v. Kennett*, 8 M. & K. 624; *Corser v. Cartwright*, 8 Ch. 971, 975. See *Gosling v. Carter*, 1 Coll. 644.

On the other hand, an intention might be collected from the will, that the executor, and not the devisee, was intended to

enforce the charge, in which case the power of sale included Chap. XXXI. the power of passing the legal estate as well.

Thus, if the land was devised for life with contingent remainders over, it is clear that the devisees could not make a good title; yet, on the other hand, the charge must be raised at once, and therefore a power of sale was implied in the executor. *Robinson v. Lowater*, 5 D. M. & G. 275.

Where a testator directed his debts to be paid by his executors, and charged them on his real estate, a power of sale by implication was not given to an administrator. *In re Clay & Tetley*, 16 Ch. D. 3.

Lord Romilly appears to have been of opinion that a charge of debts on land, where the land was beneficially devised, gave the executors an implied power of sale. See *Wrigley v. Sykes*, 21 B. 337; *Bolton v. Stannard*, 4 Jur. N. S. 576; but these cases may be supported on other grounds.

For the opinions of the text-writers on this subject, see Sugd. V. & P. 13th Ed. 545; Pow. 121—122; Williams on Real Assets, ch. vi. p. 77; Davidson's Conv. vol. 2, part ii., 468, n.; Dart, V. & P. 697, *seq.*; Lewin on Trusts, 515, *seq.*; Hayes & Jarman's Conc. Prec. 491; Farwell on Powers, 79; Shelford's Real Property Statutes, 388; Godefroi on Trustees, 387.

4. A charge upon land of specific debts or of a single legacy did not enable the devisee, though he might also be executor, to make a title. *Doran v. Wiltshire*, 3 Sw. 699; *In re Rebbeck*; *Bennett v. Rebbeck*, 42 W. R. 473; 71 L. T. 74.

Charge of specific debts or single legacy.

5. Whether under a charge of legacies only, the devisee could sell or mortgage without the concurrence of the legatees, is a question of some difficulty. In *Horn v. Horn*, 2 S. & St. 448, it was held he could not, and in *Johnson v. Kennett*, 3 M. & K. 624, Lord Lyndhurst lays down, that where legacies alone are charged, the purchasers of the real estate are bound to see to the application of the purchase-money (p. 630). But the point did not arise in that case, and Lord Lyndhurst's reasoning was not approved by Lord St. Leonards in *Stroughill v. Anstey*, 1 D. M. & G. 635, who puts it upon intention only; and Lord Cranworth, in *Colyer v. Finch*, 5 H. L. 905,

Charge of legacies only.

**Chap. XXXI.** 922, places a charge of legacies upon the same footing as a charge of debts.

The views expressed in *Stroughill v. Austey* and *Colyer v. Finch*, seem to have received statutory approval by sect. 18 of Lord St. Leonards' Act, which declares that the Act is not to affect the power of a devisee subject to debts or legacies to sell "as he may by law now do" (see also Mr. Waley's note to Davidson, vol. 2, part ii., Mortgages, p. 474; *Re Wilson*; *Pennington v. Payne*, 34 W. R. 512).

Inquiries as to debts.

A purchaser of freeholds under the old law was not entitled to inquire whether any debts were subsisting unless twenty years had elapsed since the testator's death. *In re Tanqueray-Willaine & Landau*, 20 Ch. D. 465; *In re Molyneux & White*, 13 L. R. Ir. 382; 15 L. R. Ir. 383.

A purchaser from the executor of leaseholds is not entitled to inquire, although more than twenty years have elapsed since the testator's death. *In re Whistler*, 35 Ch. D. 561; *In re Venn & Furze's Contract*, (1894) 2 Ch. 101, explaining *In re Molyneux & White*, 13 L. R. Ir. 382; 15 L. R. Ir. 383.

Which rule is to be applied to a sale of real estate by a personal representative since the Land Transfer Act remains to be determined.

II. Power to postpone sale.

A power to postpone the sale of the residuary estate, which is given upon trust for sale, involves a power to carry on a business forming part of the residue during the period of postponement. *In re Crowther*; *Midgley v. Crowther*, (1895) 2 Ch. 56.

A power to postpone may be so framed as to authorise an indefinite postponement or only a postponement for a limited period. *In re Crowther*, *supra*; *In re Smith*; *Arnold v. Smith*, (1896) 1 Ch. 171.

III. Power to mortgage.

A power to mortgage does not authorise a sale (a), though it authorises a mortgage with power of sale (b). *Cook v. Dawson*, 29 B. 123 (a); *Bridges v. Longman*, 24 B. 27; *In re Chawner's Will*, 8 Eq. 569, overruling *Clark v. Royal Panopticon*, 4 Dr. 26 (b). See, now, sect. 19 of the Conveyancing Act, 1881, which confers a power of sale on mortgagees.



Under a power to raise a sum by way of mortgage, the costs of effecting the security may be raised. *Armstrong v. Armstrong*, 18 Eq. 541. Chap. XXXI.

And a trustee may raise the costs of transferring a mortgage if he has any duty to protect the estate from foreclosure or sale. *Sewell v. Bishopp*, 68 L. T. 323; 69 L. T. 68. Costs of transfer.

As to the validity of a mortgage by demise under a power of leasing, see *Mostyn v. Lancaster*, 23 Ch. D. 583.

Where trustees have power to make out of income or capital of the real and personal estate any outlay they may consider necessary for renewals of leases, improvements, repairs, and the like, they may raise money by mortgage for those purposes. *In re Bellinger*; *Dwell v. Bellinger*, (1898) 2 Ch. 534.

And as to what words give a power to mortgage, see *In re Jones*; *Dutton v. Brookfield*, 59 L. J. Ch. 31; 61 L. T. 661; 38 W. R. 90; *Re Webb*; *Leedham v. Patchett*, 68 L. T. 545; *Redman v. Rymer*, 65 L. T. 270.

By sect. 20 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), the receipt of any trustee for any money securities or other personal property or effects payable, transferable, or deliverable to him under any trust or power is made a sufficient discharge. IV. Power of giving receipts.

The section applies to trusts created before or after the commencement of the Act.

Sect. 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), enables a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration, or property recoverable by the trustee by permitting the solicitor to have the custody, and to produce a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing Act, 1881. Receipt by agent.

The section applies only where the money or valuable consideration or property is received after the 24th December, 1888.

In cases to which the section does not apply, trustees, unless empowered to do so by the instrument under which they act, ought not to authorise a solicitor or other agent, or even one of themselves, to receive purchase-money, and the purchaser

**Chap. XXXI.** may insist upon payment either to the trustees personally, or to their account at a bank. *In re Bellamy*, 24 Ch. D. 987; *In re Flower*, 27 Ch. D. 592.

The testator may direct that an infant's receipt is to be effectual. *In re Deneker*; *Peters v. Bauchereau*, W. N. 1895, 28.

**V. Executor's powers.**

An executor may sell or mortgage any part of the testator's personal assets. *Earl Vane v. Rigden*, 5 Ch. 668; *Cruikshank v. Duffin*, 13 Eq. 555; *Berry v. Gibbons*, 8 Ch. 747; *In re Ryan & Kavanagh*, 17 L. R. Ir. 42; *In re Whistler*, 35 Ch. D. 561.

The executor's power extended to real estate used for partnership purposes. *West of England and South Wales District Bank v. Murch*, 23 Ch. D. 138; see *Boylan v. Fay*, 8 L. R. Ir. 374; *Devitt v. Kearney*, 13 L. R. Ir. 45.

And by way of compromise, a sale partly for shares in a company may be upheld. *West of England Bank v. Murch*, 23 Ch. D. 138.

An administrator *durante minore ætate* has the same power of selling personal property as an executor. *In re Cope*, 16 Ch. D. 49; not following *In re Robinson*, 3 L. R. Ir. 429.

An administrator cannot by mortgage raise money for the repair of leaseholds, which he is not under liability to repair. *Ricketts v. Lewis*, 20 Ch. D. 745.

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), sects. 1, 2, in case of death since the 1st January, 1898, the real estate vests in the personal representatives, and all enactments and rules of law . . . in relation to the administration of personal estate and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate apply to real estate so far as the same are applicable as if that real estate were a chattel real vesting in them, but some or one of several joint personal representatives cannot, without the authority of the Court, sell or transfer real estate.

**VI. Conversion of personalty within a year.**

Where there is a trust for conversion, unauthorised securities should, as a general rule, be sold within a year from the death. *Bate v. Hooper*, 5 D. M. & G. 338; *Hughes v. Empson*, 22 B. 181.

**Where postponement of conversion justified.**

But executors, who *bonâ fide* postpone the sale of securities of fluctuating value, upon which there is no liability, will not

be liable for a loss. *Burton v. Burton*, 1 M. & Cr. 80; *Marsden v. Kent*, 5 Ch. D. 598. Chap. XXXI.

Shares, upon which there is an unlimited liability, ought to be sold within the year under a direction to convert. *Grayburn v. Clarkson*, 3 Ch. 605; *Sculthorpe v. Tipper*, 13 Eq. 282; *The Heirs Hiddingh v. De Villiers Denysen*, 12 App. C. 624.

If there is a discretionary trust to convert, trustees *bonâ fide* exercising their discretion will not be liable for not selling shares upon which the liability is unlimited. *In re Norrington*; *Brindley v. Partridge*, 13 Ch. D. 655. Discretionary trust.

As to wasting securities see *Wilday v. Sandys*, 7 Eq. 455; *Tickner v. Old*, 18 Eq. 422.

Under 23 & 24 Vict. c. 145, sect. 30, executors had power to compromise debts and also claims by persons claiming as beneficiaries. *West of England and South Wales District Bank v. Murch*, 23 Ch. D. 188; *In re Warren*; *Weadon v. Reading*, 82 W. R. 916; 61 L. T. 561. VII. Power to compromise.

That section is superseded by sect. 21 of the Trustee Act, 1893, which applies to executorships and trusts constituted or created before or since the commencement of the Act.

That section provides that an executor or administrator may pay, or allow any debt or claim on any evidence that he thinks sufficient, and gives power to an executor or administrator or to two or more trustees, or to a sole acting trustee, where a sole trustee is authorised to execute the trusts and powers, to compromise claims.

Executors before the Act had a fair discretion as to suing debtors, but the Act has extended their powers, and it seems that as long as they act in good faith they will not be liable for not taking proceedings against debtors. *Re Owens*; *Jones v. Owens*, 47 L. T. 61.

The Trustee Act, 1893 (56 & 57 Vict. c. 59), sect. 1, which applies to trusts created before or after the passing of the Act, authorises trustees, unless expressly forbidden by the instrument creating the trust, to invest any trust funds in their hands, whether at the time in a state of investment or not, in the securities there mentioned, and to vary any such investment. VIII. Investment.

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Sect. 3 deals with redeemable stocks, and sect. 5 enlarges existing powers of investment.

The power to vary extends to all funds belonging to the trust, as well securities bought before the Act as those bought since. *Hume v. Lopes*, (1892) A. C. 112.

A liberal construction will be put upon a power to trustees to invest in such securities as they think fit. Such a power has been held to authorise investment in Russian railway and Egyptian bonds (a) and mortgage debentures of a limited company (b); but it does not exonerate trustees from making proper inquiries if they invest on mortgage (c). It is doubtful whether it would authorise investment in a security upon which there is a liability (d). *Lewis v. Nobbs*, 8 Ch. D. 591 (a); *In re Smith*; *Smith v. Thompson*, (1896) 1 Ch. 71; see *Stewart v. Sanderson*, 10 Eq. 26; *In re Brown*; *Brown v. Brown*, 29 Ch. D. 889 (b); *Harris v. Harris*, 29 B. 107; *Stretton v. Ashmall*, 3 Dr. 9 (c); *In re Brown*, *supra*; *In re Kavanagh*, 27 L. R. Ir. 495; *S. C.* sub nom. *Murphy v. Doyle*, 29 L. R. Ir. 833 (d).

A power to invest on mortgage does not justify investment on a contributory mortgage. *Webb v. Jonas*, 39 Ch. D. 660.

Power to invest in securities.

A power to invest in securities will not authorise the purchase of shares which are not secured upon anything. *Harris v. Harris*, 29 B. 107; *In re Kavanagh*, 27 L. R. Ir. 495; *S. C.* sub nom. *Murphy v. Doyle*, 29 L. R. Ir. 833.

Real securities.

A power to invest on real securities does not include long leaseholds. *In re Boyd's Settled Estates*, 14 Ch. D. 627.

But sect. 5 of the Trustee Act, 1893, extends such a power to the long leaseholds mentioned in that section.

Public company.

A company incorporated under the Companies Acts is a public company, but it is not, though a company incorporated by a charter granted under a special Act is a company incorporated by Act of Parliament. *In re Sharp*; *Rickett v. Sharp*, 45 Ch. D. 286; *Elve v. Boyton*, (1891) 1 Ch. 501; *In re Smith*, *Davidson v. Myrtle*, (1896) 2 Ch. 590.

Power to deposit with a firm.

A power to invest by placing on deposit with a firm does not authorise trustees to continue the deposit after a change

in the members of the firm. *In re Tucker; Tucker v. Tucker*, Chap. XXXI. (1894) 1 Ch. 724.

The cases upon investment will be found collected in Godefroi on Trustees, 419; Lewin, 326; Vaizey, 428.

Under the common power of investing with consent a previous consent is necessary, and it must be given at the time of the investment, and cannot be given by anticipation. *Bateman v. Davis*, 3 Mad. 98; *Child v. Child*, 20 B. 50.

If the consent is to be signified by deed, the deed may be executed after the exercise of the power, if consent has been previously given. *Offen v. Harman*, 1 D. F. & J. 253.

Trustees holding lands on trust to raise money out of the rents or to pay the rents to a tenant for life, can let the lands from year to year or for any reasonable term. *Naylor v. Arnitt*, 1 R. & M. 501; *Fitzpatrick v. Waring*, 11 L. R. Ir. 35; not following *In re Shaw's Trusts*, 12 Eq. 124.

IX. Powers of leasing.

Where a tenant for life with power of leasing enters into an agreement for a lease and dies before the lease is executed the trustees may carry the agreement into effect. *Davis v. Harford*, 22 Ch. D. 128. See now the Settled Land Act, 1882, sect. 12.

As to the construction of powers of leasing, see *Hallett to Martin*, 24 Ch. D. 624; *Re James*; *James v. Gregory* 73 L. T. 1; 64 L. J. Ch. 686.

An executor can make a lease, but if impugned by a beneficiary it would lie upon the executor and lessee to show that it was made in a due course of administration. *Keating v. Keating*, Ll. & G. t. Sug. 133.

Lease by executor.

If an executor makes a lease giving the lessee an option to purchase at a fixed price, the option to purchase cannot be exercised against the beneficiaries. *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236.

Lease with option to purchase.

In the absence of any special circumstances trustees of contiguous estates held upon different trusts cannot make a lease of both estates under one demise. *Tolson v. Sheard*, 5 Ch. D. 10.

Lease of several properties.

A power to lease after the death of a tenant for life cannot be exercised before his death, though the life estate may be surrendered. *Cox v. Day*, 13 East, 118.

Power to lease not accelerated.

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for renewal.

As to the effect of covenants for renewal in leases under powers, see *Gas Light and Coke Company v. Towse*, 35 Ch. D. 519.

In certain cases the Court is enabled to remedy defects in leases granted under powers. 12 & 13 Vict. c. 26; 13 & 14 Vict. c. 17; *Gas Light and Coke Company v. Towse*, *supra*.

X. Manage-  
ment, repairs,  
and improve-  
ments.

Large powers of management, and of laying out money in repairs and improvements, are given by the Conveyancing Act, 1881, sect. 42, and the Settled Land Acts, 1882 to 1890.

Money to be laid out in land to go with a settled estate could, before the Settled Land Acts, be laid out in building or rebuilding cottages and other edifices on the estate but not in improvements or permanent repairs, unless the repairs were in the nature of salvage. *In re Leigh's Estate*, 6 Ch. 887; *Drake v. Trefusis*, 10 Ch. 364; *Re Lord De Tabley*; *Leighton v. Leighton*, 75 L. T. 328; *Re Hawker*; *Duff v. Hawker*, 76 L. T. 286.

And a power to make out of the income or capital any outlay for the benefit of the estate was held not to carry the matter further. *Re Lord De Tabley*, *supra*; see *In re Bellinger*; *Durell v. Bellinger*, (1898) 2 Ch. 534.

Now, by virtue of the Settled Land Act, 1882, sect. 21, and the Settled Land Act, 1890, sect. 13, capital money arising under the Act can, on the direction of the tenant for life, be laid out in any of the modes mentioned in those sections, which include improvements, and inasmuch as land if purchased could be sold by the tenant for life and applied under the Act, money to be invested in land can be applied as capital money arising under the Act. *In re Mackenzie's Trusts*, 23 Ch. D. 750.

The Conveyancing Act, sect. 42, confers powers of management upon trustees where infants are beneficially interested in the land and expenses may be paid out of income.

Duty of  
trustees as to  
leaseholds.

Where leaseholds are held by trustees on trust for a tenant for life with limitations over, it is the duty of the trustees to see that the covenants in the leases as to repairs are performed. *In re Fowler*; *Fowler v. Odell*, 16 Ch. D. 723.

And trustees for sale ought to keep the property in a saleable condition, and to execute any repairs necessary for that purpose, and the amount may be raised out of capital if there is no obligation on the tenant for life to repair. *In re Hotchkys; Freke v. Calmady*, 32 Ch. D. 408; *Re Freman; Diamond v. Newburn*, (1898) 1 Ch. 28. Chap. XXXI.

Where there is no power given to the trustees to lay out money in improvements or repairs, and the Settled Land Acts do not apply, the Court has, under special circumstances, allowed money to be raised out of capital and spent on improvements or repairs. See *In re Jackson; Jackson v. Talbot*, 21 Ch. D. 786; *In re Household; Household v. Household*, 27 Ch. D. 558; *Conway v. Fenton*, 40 Ch. D. 512; *In re Hurst*, 29 L. R. Ir. 219; *In re De Teissier; De Teissier v. De Teissier*, (1893) 1 Ch. 153; *In re Montagu; Derbshire v. Montagu*, (1897) 2 Ch. 8.

By sect. 18 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), trustees are empowered to insure up to three-fourths of the value of the building insured, and to pay the premiums out of the income of the property insured and any other property held on the same trusts. The section applies to trusts created before and after the commencement of the Act. XI. Power to insure

By sect. 19 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), trustees of renewable leaseholds may, if they think fit, and must, if thereto required by any beneficiary, use their best endeavours to obtain renewals. Where by the terms of the settlement or will the tenant for life is entitled to enjoyment without any liability to renew or contribute to the expense of renewal the trustees cannot exercise this power without his consent. The trustees may pay the expenses of renewal out of any money in their hands held upon the same trusts, or if they have none, may raise the expenses by mortgage. The section applies to trusts created before and after the commencement of the Act. XII. Power to renew leases.

The section does not alter rights between tenant for life and remainderman. *In re Baring; Jeune v. Baring*, (1893) 1 Ch. 61.

## CERTAIN POWERS COMMONLY INSERTED IN WILLS.

### Chap. XXXI.

#### XIII. Carrying on business.

Executors or trustees cannot carry on the testator's business without express authority to do so. *Travis v. Milne*, 9 Ha. 142; *Kirkman v. Booth*, 11 B. 278.

Where a will contains the usual trust for sale with power to postpone the sale, the executors may carry on the business during the period of postponement. *In re Chancellor*; *Chancellor v. Brown*, 26 Ch. D. 42; *In re Crowther*; *Midgley v. Crowther*, (1895) 2 Ch. 56; *In re Smith*; *Arnold v. Smith*, (1896) 1 Ch. 171.

#### What capital may be employed.

A direction to carry on the testator's business only authorises the employment in the business of the capital which the testator himself employed in the business at his decease. *M'Neillie v. Acton*, 4 D. M. & G. 744; see *Re Dimmock*; *Dimmock v. Dimmock*, 52 L. T. 494.

#### Power to use business premises.

Under such a direction the executors are entitled to use the freehold or leasehold premises where the business was carried on by the testator, and they may mortgage them for the purposes of the business. *Deritt v. Kearney*, 13 L. R. Ir. 45; *In re Cameron*; *Nixon v. Cameron*, 26 Ch. D. 19.

An authority to trustees to carry on the business does not authorise two out of three trustees to carry it on. *Ex parte Butcher*; *In re Mellor*, 13 Ch. D. 465.

#### Bankruptcy of executor.

If the executor becomes bankrupt the beneficiaries have no claim against his estate for the assets of the testator properly employed in the trade, though they can prove for assets employed in excess of his authority. *Ex parte Richardson*, Buck, 202; 3 Mad. 198; *Scott v. Ison*, 34 B. 494; *Ex parte Butcher*; *In re Mellor*, 13 Ch. D. 465.

#### XIV. Power of maintenance.

Sect. 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) provides that "where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit the income of that property or



any part thereof whether there is any other fund applicable to the same purposes or any person bound by law to provide for the infant's maintenance or education or not." Chap. XXXI.

The residue of the income is to be accumulated and go to the person ultimately entitled to the property, but the trustees may apply accumulations as if they were income of the current year.

The section applies to all instruments if there is no contrary intention expressed.

An express trust to accumulate the income of infant's shares is not a contrary intention. *In re Thatcher's Trusts*, 26 Ch. D. 426.

Where an infant is tenant for life income accumulated during his minority belongs to the infant on attaining twenty-one. *In re Wells*; *Wells v. Wells*, 48 Ch. D. 281; *In re Humphreys*; *Humphreys v. Levett*, (1898) 3 Ch. 1. Accumulations of income.

When an executor has paid the debts and legacies and has a clear residue in hand which belongs to an infant, he is a trustee for the infant within the section. *In re Smith*; *Henderson-Roe v. Hitchins*, 42 Ch. D. 302.

This power appears to be practically the same as that contained in Lord Cranworth's Act (23 & 24 Vict. c. 145), sect. 26. It enables income to be applied for maintenance in cases where the gift of capital and income is contingent, but not where the legacy does not carry interest. *In re Cotton*, 1 Ch. D. 232; *In re George*, 5 Ch. D. 837; *In re Judkin's Trusts*, 25 Ch. D. 748; *In re Dickson*; *Hill v. Grant*, 28 Ch. D. 291; 29 Ch. 331; *In re Holford*; *Holford v. Holford*, (1894) 3 Ch. 30; see *ante*, p. 164.

The power of maintenance does not extend beyond the age of twenty-one. *In re Breeds' Will*, 1 Ch. D. 226.

Under a power to apply money towards the maintenance or support of infants, sums may be expended on education. *In re Breeds' Will*, 1 Ch. D. 226. Education.

Directions as to maintenance may be variously expressed.

If the direction is so worded as to amount to a trust under which the trustees are bound to apply the whole or a portion of the income to maintenance, the father is entitled to have the Maintenance clauses.  
Imperative trust to apply income.

Chap. XXXI. trust carried into effect without regard to his ability to maintain his children, and if he maintains the children at his own expense he or his representatives are entitled to an inquiry how much ought to have been applied in the maintenance of the children, and that amount will be recouped out of the trust estate. *Mundy v. Earl Howe*, 4 B. C. C. 223; *Meacher v. Young*, 2 M. & K. 490; *Stocken v. Stocken*, 4 Sim. 152; 4 M. & Cr. 95; these cases are discussed in *Ransome v. Burgess*, 3 Eq. 773; *Wilson v. Turner*, 22 Ch. D. 521.

It is said that the doctrine applies only to marriage settlements and that it is founded on the father's contract. The point really seems to be one of construction, the question being are the trustees bound to apply the income in maintenance.

Thus, if there is in a will a trust to apply income in maintaining infants, the father is entitled to have the income so applied without reference to his ability to maintain them. If he himself be the trustee he may apply the income in maintenance in the same way. *Hawkins v. Watts*, 7 Sim. 199; *Bateman v. Foster*, 1 Coll. 118; *Newton v. Curzon*, 16 L. T. 696.

Power and  
discretionary  
trust.

If there is only a power given to trustees to apply income in maintenance, or there is a discretionary trust to apply all or any part of the income so that they are not bound to apply any, the father has no such right. *Thompson v. Griffin*, Cr. & P. 817; *In re Kerrison's Trust*, 12 Eq. 422 (the distinction there made between a marriage settlement and a voluntary settlement seems unsatisfactory); *In re Bryant*; *Bryant v. Hickley*, (1894) 1 Ch. 324. See *In re Lofthouse*, 29 Ch. D. 921.

Trustees  
under dis-  
cretion may  
apply income  
though father  
able to main-  
tain.

At the same time, if there is a discretion to apply all or any part of the income in maintenance, there seems no reason to doubt that the trustees may in their discretion apply the income in maintenance, though the father may be able to maintain the children; and if the father is himself the trustee and applies the income in maintenance, he cannot be called to account though he may have been of ability to maintain the children out of his own property. *Malcomson v. Malcomson*, 17 L. R. Ir. 69.

If the trustees in such a case do not make any payment to the father for maintenance, he cannot afterwards claim past maintenance; and if they pay over the whole income to him without exercising any discretion and he spends it without any regard to the question of maintenance, his estate is liable for the amount. *Wilson v. Turner*, 22 Ch. D. 521. Chap. XXXI.

If there is a trust to apply the income in maintenance, the trustees having a discretion only as to the time and manner of the application, the Court will control the execution of the trust, and if there are two funds will require the trustees to apply the fund, the application of which is most for the benefit of the person to be maintained. *In re Weaver*, 21 Ch. D. 615. Discretion as to time and manner of application.

If the income of two funds is applicable to maintenance and the trustees do not exercise a discretion as to which income they apply, the Court will exercise the discretion and treat that income applied in maintenance which it would have been most beneficial for the infant to apply. *Lucas v. King*, 11 W. R. 818; *In re Wells*; *Wells v. Wells*, 43 Ch. D. 281. Income of two funds.

For the principles upon which maintenance may be allowed to infants by the Court contrary to the terms of the will, see *Harelock v. Harelock*; *In re Allan*, 17 Ch. D. 807 (doubted in *Re Smeed*; *Archer v. Prall*, 54 L. T. 929); *In re Colgan*, 19 Ch. D. 305; *Kemmis v. Kemmis*, 13 L. R. Ir. 372; 15 *ib.* 90; *Re Tanner*, 51 L. T. 507; *In re Collins*; *Collins v. Collins*, 32 Ch. D. 229; *In re Alford*; *Hunt v. Parry*, 32 Ch. D. 383.

A trustee who has, without authority, expended sums for the maintenance of an infant, will be allowed all such sums as the Court would have authorised if it had been applied to. *Brown v. Smith*, 10 Ch. D. 377. Sums expended without authority.

When a guardian pays an infant's income to his co-guardian, by whom the infant is properly maintained, the guardian will be allowed such a sum as was proper to be allowed for the maintenance of the infant without vouching the details. *In re Evans*; *Welch v. Chennell*, 26 Ch. D. 58.

The Court has jurisdiction on a summary application to

**Chap. XXXI.** direct past maintenance to be charged on an infant's freehold estate in possession. *In re Howarth*, 8 Ch. 415.

But no such charge can be created for future maintenance, nor can it be created where the estate is in reversion. *In re Hamilton*, 81 Ch. D. 291; *Cadman v. Cadman*, 83 Ch. D. 397.

It seems that accumulations of income may be applied in maintenance in subsequent years without express authority. *Edwards v. Grove*, 2 D. F. & J. 210.

XV. Discretionary powers generally.

The cases above cited on the question of maintenance are authorities on the view taken by the Court of discretionary powers given to trustees. It may be convenient here to refer to the principal cases.

Large discretion not interfered with.

Where a large discretion is conferred upon trustees the Court will not interfere with the exercise of the discretion so long as it is honestly exercised. It matters not whether the discretion is expressed in the form of a trust or of a power. *Gisborne v. Gisborne*, 2 App. C. 300; *Tabor v. Brooks*, 10 Ch. D. 273; *In re Courtier*; *Coles v. Courtier*, 84 Ch. D. 136.

Power to postpone.

Upon this principle, where there is a trust for sale with power to postpone so long as the trustees think fit, the Court will not, so long as the trustees act in good faith, compel them to sell, or if they decide to sell restrain them from so doing. *In re Norrington*; *Brindley v. Partridge*, 18 Ch. D. 654; *In re Blake*; *Jones v. Blake*, 29 Ch. D. 913; *In re Crowther*; *Midgley v. Crowther*, (1895) 2 Ch. 56; see *Thomas v. Williams*, 24 Ch. D. 558.

The result is that if one of the trustees honestly refuses, under existing circumstances, to concur in exercising a discretionary trust or power he cannot be made to do so, and the trust or power cannot be exercised. *Marquis Camden v. Murray*, 16 Ch. D. 161; *Tempest v. Lord Camoys*, 21 Ch. D. 571; *In re Lever*; *Cordwell v. Lever*, 76 L. T. 71; see *Re Atkins*; *Newman v. Sinclair*, 81 L. T. 421.

It is, of course, a question of construction in each case whether the trustees are intended in any particular event to exercise a trust or power which is in terms discretionary.

Thus, if legacies are payable out of the proceeds of sale of

real estate and the personalty is insufficient to pay them, it may be the duty of the trustees to exercise a discretionary power to sell the real estate conferred upon them. *Nickisson v. Cockill*, 3 D. J. & S. 622; see 34 Ch. D. 140. Chap. XXXI.

If there is a discretionary trust or a power in the nature of a trust and the trustees decline, or one of the trustees declines, to exercise the discretion, the Court will interfere and exercise the discretion. Power in nature of a trust.

For instance, where the testator directed his mansion-house to be kept furnished and stocked and gave his trustees power to lease the house and furniture, and one trustee objected to the house being let, the Court compelled the trustees to exercise the power of leasing. *Tempest v. Lord Camoys*, 21 Ch. D. 576, n.; where the dissentient trustee objected not to any particular lease but apparently to any letting whatever. See, too, 34 Ch. D. 140.

The Court will, of course, restrain an improper exercise by trustees of a discretion vested in them. *Tabor v. Brooks*, 10 Ch. D. 273; *Bethell v. Abraham*, 17 Eq. 24. Improper exercise of discretion.

The commencement of an administration action does not put an end to the trustees' powers. For instance, after the commencement of such an action and before judgment, they could exercise a trust for or power of sale, though no doubt a prudent trustee would apply for the sanction of the Court and a prudent purchaser would not complete without notice to the parties to the action. *Cafe v. Bent*, 3 Ha. 245, 249; *Turner v. Turner*, 30 B. 414; see *Walker v. Smalwood*, Amb. 676. Effect of administration action on trustees' powers.

After judgment in an administration action it may be laid down as a general principle, that ordinary powers and discretions must be exercised subject to the approval of the Court, though the will may confer such a special discretion upon a trustee as the Court will not, even after judgment for administration, control or interfere with if it is honestly exercised. *Bethell v. Abraham*, 17 Eq. 24; *In re Gadd*; *Eastwood v. Clarke*, 23 Ch. D. 134 (new trustees); *In re Norris*; *Allen v. Norris*, 27 Ch. D. 393; and cases cited above. See, too, *In re Mansel*; *Rhodes v. Jenkin*, 54 L. J. Ch. 883. Effect of judgment in administration action.

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Tenant for life  
under Settled  
Land Acts.

Payment into  
Court.

Judgment for administration does not, however, affect the powers conferred upon a tenant for life by the Settled Land Acts. *Cardigan v. Curzon-Howe*, 30 Ch. D. 531.

Payment into Court in an administration action does not put an end to the discretion of trustees over the fund (a). But if the trustees pay the fund into Court under the Trustee Act their discretion is at an end, and if it is a personal discretion it cannot be exercised by the Court (b). *Brophy v. Bellamy*, 8 Ch. 798 (a); *In re Coe's Trust*, 4 K. & J. 199; *Re Ashburnham's Trusts*, 54 L. T. 84; *In re Mulqueen's Trusts*, 7 L. R. Ir. 127; *Re Nettlefold's Trusts*, 59 L. T. 315; *In re Murphy's Trust*, (1900) 1 Ir. 145, not following *Re Landon's Trusts*, 40 L. J. Ch. 370 (b).

XVI. Power of  
advancement.

Advancement is a payment to persons who are presumably entitled to or have a vested or contingent interest in an estate or a legacy before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled. Per Cotton, L.J., *Re Aldridge; Abram v. Aldridge*, 55 L. T. 554.

Such a power may be limited to minority if the will so directs, for instance, if the power applies only to a child being a minor (*Clarke v. Hogg*, 19 W. R. 617); but it seems it is not in an ordinary case limited to minority, though it is as a rule only applicable during the early life of the object. *Re Aldridge*, 54 L. T. 827; 55 L. T. 554.

A power to advance out of a presumptive share ceases when the share has become vested. *Molyneux v. Fletcher*, (1898) 1 Q. B. 648.

Whether  
power applies  
to an appointed  
share.

Where a fund is appointed to a child of A. under a special power in the will and the will contains a power to advance any child of A., the power of advancement applies as well to an appointed share as to a share taken in default of appointment. *McMahon v. Gaussen*, (1896) 1 Ir. 143; see, too, *In re Hocking*; *Michell v. Loe*, (1898) 2 Ch. 567.

A power of advancement, exercisable with the consent of the tenant for life, may be exercised after the bankruptcy of the tenant for life with his consent and that of his trustee in bankruptcy. *In re Cooper*; *Cooper v. Slight*, 27 Ch. D. 565.

A power of advancement would not justify the payment of a sum to a beneficiary merely to put into his own pocket. But it would justify the payment of a sum for the purpose of making a settlement on the family of the beneficiary if he has no property producing income. *Roper Curzon v. Roper Curzon*, 11 Eq. 452. Chap. XXXI.

A power of advancement may justify payment of a marriage portion to a daughter. *Lloyd v. Cocker*, 27 B. 645. Marriage portion.

Such a power would not justify a payment to the husband of a beneficiary without some security for the repayment of the amount. *Talbot v. Marshfield*, 3 Ch. 622; *In re Kershaw's Trusts*, 6 Eq. 322; *Molynaux v. Fletcher*, (1898) 1 Q. B. 648. Payment to husband.

A power to apply a sum for the preferment, advancement, or otherwise for the benefit of a legatee authorises the payment of his debts. *Lowther v. Bentinck*, 19 Eq. 166; see *In re Brittlebank*; *Coates v. Brittlebank*, 90 W. R. 99. Payment of debts.

Sect. 4 of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), enacts as follows:— XVII. Appropriation.

(1) The personal representatives of a deceased person, may in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court. Land Transfer Act, s. 4.

(2) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property

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so conveyed is accepted by the person to whom it is conveyed, in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorise the registrar to register the person to whom the property is appropriated as proprietor of the land.

Marginal note  
not accurate.

The marginal note to the section, "Appropriation of land, &c.," is not accurate, as the section extends to "any part of the residuary estate."

The expression personal representative in the Act means an executor or administrator (see sect. 24 (2)). Sect. 4 does not, therefore, in terms apply to a trustee. Rules have not yet been made as to the mode of valuation or the time within which application is to be made to the Court.

Appropriation  
apart from  
Act.

Apart from the Act, executors and trustees had power, with the consent of a legatee, though he might himself be an executor or trustee, to appropriate any securities, in or towards satisfaction of his legacy or share of residue. They also had power to appropriate authorised securities or securities which they were empowered to retain in or towards satisfaction of a settled legacy or a settled share of residue. If the appropriation was fairly and honestly made it was binding on all persons interested in the estate. *In re Lepine*; *Dowsett v. Culver*, (1892) 1 Ch. 210; *In re Richardson*; *Morgan v. Richardson*, (1896) 1 Ch. 512; *Re Brooks*, 76 L. T. 771; *In re Nickels*; *Nickels v. Nickels*, (1898) 1 Ch. 680.

Power of  
administrator.

An administrator had a similar power of appropriation. *Elliott v. Kemp*, 7 M. & W. 306; *Barclay v. Owen*, 60 L. T. 220.

Effect of  
valid appro-  
priation.

The effect of a valid appropriation is that the legatee can look only to the appropriated sum. If it diminishes in value he must bear the loss. If it increases in value he gets the benefit. On the other hand, he is not affected by any diminution in value of the rest of the estate, and after appropriation the executor cannot claim any indemnity against the



appropriated sum for liabilities incurred by him in respect of other parts of the estate, nor can he retain any part of the appropriated sum against a debt due from the legatee. *Ex parte Chadwin*, 3 Sw. 380; *Peterson v. Peterson*, 3 Eq 111; *Ballard v. Marsden*, 14 Ch. D. 374; *Fraser v. Murdoch*, 6 App. C. 855. Chap. XXXI.

On the other hand, a legatee whose legacy has not been appropriated, is not entitled to share in an increase in the value of the residue before appropriation, although the executor is also a residuary legatee. *In re Campbell*; *Campbell v. Campbell*, (1893) 3 Ch. 468.

Where there was a direction to the trustees to select, appropriate, and set apart so much of the testator's personal estate as would produce 1,500*l.* a year for the benefit of his widow, and the trustee refused to make any selection, it was held that sufficient Consols must be set aside to answer the annuity. *Prendergast v. Prendergast*, 3 H. L. 195.

Direction to appropriate.

A direction to set apart any investments "hereby" authorised to secure an annuity, authorises the appropriation of investments named in the will only and not of investments authorised by the Trustee Act, 1893. *In re Outhwaite*; *Outhwaite v. Taylor*, (1891) 3 Ch. 494.

A direction to appropriate by investment on mortgage is satisfied by appropriating a mortgage which already forms part of the estate. *Ames v. Parkinson*, 7 B. 379.

An indemnity clause, providing that any trustee enabling his co-trustee to receive any moneys should not be liable to see to the application thereof, has been held to protect a trustee against misappropriation of the trust fund by his co-trustee. *Wilkins v. Hogg*, 3 Giff. 116; 10 W. R. 47; *Parr v. Dundas*, 29 W. R. 382.

XVIII. Indemnity.

And as to the effect of indemnity clauses, see *Knox v. Mackinnon*, 13 App. C. 753; *Rae v. Meek*, 14 App. C. 558; *Wyman v. Paterson*, (1900) A. C. 271.

Trustees are of course entitled to be indemnified out of the trust estate against liabilities they incur.

But if they properly appropriate certain funds to a particular legacy, their right to indemnity against the appropriated fund,

**Shap XXXI.** for liabilities incurred, with reference to other parts of the estate, is gone. *Fraser v. Murdoch*, 6 App. C. 855.

**XIX. Costs.**

A direction that a solicitor trustee is to be allowed to charge for professional services will be limited strictly to professional services unless there are words extending the direction to non-professional charges. *Harbin v. Darby*, 28 B. 325 ; *In re Ames* ; *Ames v. Taylor*, 25 Ch. D. 72 ; *In re Chapple* ; *Newton v. Chapman*, 27 Ch. D. 584 ; *In re Fish* ; *Bennett v. Bennett*, (1898) 2 Ch. 413.

**XX. Power to decide questions.**

A power to trustees to decide questions does not oust the jurisdiction of the Court. *Massy v. Rogers*, 11 L. R. Ir. 409.

## CHAPTER XXXII.

## ABSOLUTE INTERESTS IN PERSONALTY.

## I. BEQUESTS OF PERSONALTY WITH WORDS OF LIMITATION.

1. It is clear that a bequest to A. and his executors, or to A. and his representatives, gives A. the absolute interest, the additional words being merely words of limitation. *Lugar v. Harman*, 1 Cox, 250; *Taylor v. Beverley*, 1 Coll. 108; *Appleton v. Rowley*, 8 Eq. 139.

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Bequest to A. and his executors or representatives.

So, too, a gift to A. for life, and then to his executors or administrators, or to his personal representatives, gives A. the absolute interest. *A.-G. v. Malkin*, 2 Ph. 64; *Saberton v. Skeels*, 1 R. & M. 587; *Alger v. Parrott*, L. R. 3 Eq. 328; *Avern v. Lloyd*, 5 Eq. 383; *Wing v. Wing*, 24 W. R. 878.

Bequest to A. for life and then to his executors.

It is immaterial that the life interest is determinable. *Webb v. Sadler*, 14 Eq. 533; 8 Ch. 419.

If, however, the gift is to A. for life, and then to his executors or administrators for their own use and benefit, they will take beneficially. *Sanders v. Franks*, 2 Mad. 147; *Wallis v. Taylor*, 8 Sim. 241.

In what case the executors take beneficially.

But the intention that the executors are to take beneficially must be unmistakably plain. *Stocks v. Dodsley*, 1 Kee. 325.

A gift to A. for life with power to appoint by will and in default of appointment to his executors and administrators, gives an absolute interest and entitles the donee to immediate payment, and it is apparently not necessary that the power should be released. *Devall v. Dickens*, 9 Jur. 550; *Page v. Soper*, 11 Ha. 321.

2. A bequest of personalty to a man and his heirs would no doubt pass the absolute interest.

Bequest to A. and his heirs.

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Bequest to A.  
and the heirs  
of his body.

So, too, a bequest to A. and the heirs of his body, or to A. and the heirs of his body in equal proportions, gives A. an absolute interest in personalty. *Leventhorpe v. Ashbie*, Rolle's Ab. 831, pl. 1; *Seale v. Seale*, 1 P. W. 290; *In re Barker's Trusts*, 52 L. J. Ch. 565.

Bequest to A.  
for life and  
if he dies  
without issue  
over before  
the Wills Act.

It seems that in wills before the Wills Act, if the gift is to A. for life, and if he die without issue over, an absolute interest will not be given to A. by implication, though if the property had been real estate, A. would have taken an estate tail. *Proctor v. Upton*, cit. 5 D. M. & G. 199, n.; *In re Banks' Trust*; *Ex parte Hovill*, 2 K. & J. 387; see *A.-G. v. Bayley*, 2 B. C. C. 553; *Chandless v. Price*, 3 Ves. 98; *Bodens v. Lord Galway*, 2 Ed. 297.

Bequest to A.  
for life and  
then to the  
heirs of his  
body followed  
by a gift over.

On the other hand, a gift to A. for life and then to the heirs of his body, and if he die without issue over, gives A. an absolute interest. *Butterfield v. Butterfield*, 1 Ves. Sen. 133; *Theobridge v. Kilburne*, 2 Ves. Sen. 233; *Williams v. Lewis*, 3 Dr. 669; 6 H. L. 1013; see, too, *Elton v. Eason*, 19 Ves. 73; *Garth v. Baldwin*, 2 Ves. Sen. 646; *Tothill v. Pitt*, 1 Mad. 488; *S. C. sub nom. Earl of Chatham v. Tothill*, 7 B. P. C. 453; *Brouncker v. Bagot*, 19 Ves. 574; 1 Mer. 271.

If, in wills before the Wills Act, the gift over upon failure of issue can be limited to failure of issue at the death of the tenant for life, a prior gift to A. and the heirs of his body gives A. an interest defeasible upon failure of issue at his death. *Read v. Snell*, 2 Atk. 642; *Hodgeson v. Bussey*, 2 Atk. 89; *Paine v. Stratton*, 2 Atk. 647; 3 B. P. C. 257; *Fearne*, C. R. 494.

In these cases the testator has shown a clear meaning, that the property should go in a course of devolution, till there is an exhaustion of heirs of the body; and, as this intention cannot be carried into effect, the Court gives an absolute interest in personalty. See *Ex parte Wynch*, 5 D. M. & G. 188.

In what cases  
heirs of the  
body will be  
a word of  
limitation in  
bequests since  
the Wills Act.

But if such an intention is not manifested, it seems that the Courts will be unwilling to apply the rules of tenure to personal estate, and it must be collected from the general language of the will, whether the words heirs and heirs of the body are intended to be words of limitation or purchase.

A gift to A. for life and to her heirs after her is an absolute gift. *Atkinson v. L'Estrange*, 15 L. R. Ir. 340. Chap. XXXII.

And, if the bequest is to A. for life, and after her decease to her heirs as she shall give it by will, and if she die without a will to her right heirs for ever, the term right heirs is equivalent to executors and administrators. *Powell v. Boggis*, 35 B. 535.

So if the intention is to create a succession of estates, as in a gift to A. for life and after his decease to the heirs male of his body, and so in succession, A. takes an absolute interest. *Britton v. Twining*, 3 Mer. 176 ; see *Cleary's Trusts*, 16 Ir. Ch. 438 ; *Sparling v. Parker*, 29 B. 450.

But if there is anything to show that the heirs were to take by purchase ; if, for instance, they are to take as tenants in common, the life estate will not be enlarged, whether there is a gift over in default of issue or not. *Bull v. Comberbach*, 25 B. 540 ; *Jacobs v. Amyott*, 4 B. C. C. 542 ; *Jeafrason's Trust*, L. R. 2 Eq. 276 ; see, too, *In re Russell*, 53 L. J. Ch. 400 ; *revd.* 52 L. T. 559.

Words of distribution superadded make the word heirs a word of purchase.

So, too, in a gift to A. for life with a direction that he was to have no power over the property beyond its legal vestment for conveyance, &c., and after his decease to his heirs, A. took only a life interest in the personalty, though he took the realty in fee. *Herrick v. Franklin*, 6 Eq. 593 ; see *Comfort v. Brown*, 10 Ch. D. 146.

The better opinion seems now to be, that the Court will not shrink from giving a different construction to the words heirs and heirs of the body as regards realty and personalty, though given together in the same clause. *Herrick v. Franklin*, *supra*.

Whether the same construction will be adopted as regards realty and personalty where they are given together.

3. The word issue is less "mysteriously inflexible" than the words heirs of the body, and therefore in a gift of personalty to A. and his issue it may be a word of limitation or of purchase, in which latter case the same question arises as in gifts to A. and his children, whether A. and the issue take jointly or whether the issue take subject to a life interest in A.

a. *Primâ facie* it seems a gift of personalty to A. and his issue, as it would give A. an estate tail in realty, gives him an

Requests to a person and his issue.

**Chap. XXXII.** absolute interest in personality. This seems clear, when there is a gift over in default of issue, for the limitation over shows, that the gift is meant to extend to all the issue, and all the issue might not be capable of taking jointly with the parent. *Lygon v. Michell*, 1 Mad. 467; *Beaver v. Nowell*, 25 B. 551; *Re Andrews' Will*, 27 B. 608; *Donn v. Penny*, 1 Mer. 20; 19 Ves. 544; *Gibbs v. Tait*, 8 Sim. 132.

And apparently the same rule will hold good even where there is no gift over. *Harvey v. Towell*, 7 Ha. 281; *Samuel v. Samuel*, 9 Jur. 222; *Prentice v. Brooke*, 5 L. R. Ir. 485; but *quære*.

The case is stronger in favour of this construction, if it is a gift of realty and personality together, or if personality is directed to go in the same way as realty. *Parkin v. Knight*, 15 Sim. 83; *Tate v. Clarke*, 1 B. 100.

In what cases  
issue will be  
a word of  
purchase.

b. If, however, there is any evidence, that the testator did not use the word as a word of limitation, by the use of expressions implying, either that the parent and issue take concurrently: *Clay v. Pennington*, 7 Sim. 370; *Larc v. Thorp*, 27 L. J. Ch. 649; or that the issue take after the parent's death as purchasers: *Lampley v. Blower*, 3 Atk. 396; *Parsons v. Coke*, 4 Dr. 296; or that they are to take by substitution, by directing, for instance, that the issue are to take *per stirpes*: *Butter v. Ommancey*, 4 Russ. 70; *Pearson v. Stephen*, 5 Bl. N. S. 203; *Dick v. Lacy*, 8 B. 214; *Re Stanhope's Trusts*, 27 B. 201; the issue will take by purchase.

Bequests to  
A. for life and  
then to his  
issue.

c. If the gift of personality is to A. for life and then to his issue, whether there is a gift over in default of issue or not, A. takes only an estate for life. *Knight v. Ellis*, 2 B. C. C. 569; *Ex parte Wynch*, 5 D. M. & G. 188; *Goldney v. Crabb*, 19 B. 388; *Foster v. Wybrants*, 1. R. 11 Eq. 40.

And the same rule applies with regard to the personality, where real and personal property are given together, unless there is something to show that the personality was to go in the same manner as the realty.

"Except in a case where the personality is either quite subordinate in value or a mere adjunct of the realty, as, for example, a leasehold garden held together with a freehold

house, it is very difficult to give any sound logical reason for the proposition, that an intention that the two kinds of property should go together ought to carry the whole in accordance with the rules applicable to realty rather than those which would apply to a bequest of personalty alone." Per Lord Hatherley, *Jackson v. Calvert*, 1 J. & H. 235. Chap. XXXII.

But, though only a life estate may be given to the ancestor, if the issue are to take successively according to seniority, and not conjointly, issue will be treated as a word of limitation. *Jordan v. Lowe*, 6 B. 350.

## II. GIFTS OF THE INCOME OF PROPERTY INDEFINITELY.

A gift of the income of property to a person, without limitation as to time, is a gift of the capital, where no other disposition of the capital is made.

This is the case, though the gift may be to the separate use, or through the medium of a trust. *Elton v. Shepherd*, 1 B. C. C. 582; *Phillips v. Chamberlayne*, 4 Ves. 51; *Rawlings v. Jennings*, 13 Ves. 39; *Boosey v. Gardner*, 18 B. 471; *Haig v. Swiney*, 1 S. & St. 487; *Humphrey v. Humphrey*, 1 Sim. N. S. 536; *Watkins v. Weston*, 32 B. 238; 3 D. J. & S. 434; *Penny v. Pippin*, 15 W. R. 306; *In re Tandy*; *Tandy v. Tandy*, 34 W. R. 748; *Davidson v. Kimpton*, 18 Ch. D. 213; *Re Coward*; *Coward v. Larkman*, 56 L. T. 278; 57 L. T. 285; 60 L. T. 1; *In re Morgan*; *Morgan v. Morgan*, (1893) 3 Ch. 222; see *In re L'Herminier*; *Mounsey v. Buston*, (1894) 1 Ch. 675. Gift of income without more is a gift of corpus.

And a fund given on trust for A. until B. conveys certain property as directed by the will, and then to divide the fund equally between A. and B., becomes the absolute property of A. on B. dying an infant. *Louther v. Carendish*, 1 Ed. 99; 3 B. P. C. 186.

A gift of income during widowhood is a gift for life or during widowhood; but a gift of income to a legatee so long as she should continue single and unmarried has been held to be an absolute interest if the legatee did not marry. *Rishton v. Cobb*, 5 M. & Cr. 145; see 25 Ch. D. 689. Income during widowhood.

In the same way a gift of the income of property, with a power superadded of disposing of it by will, is an absolute

Chap. XXXII. interest. *Southouse v. Bate*, 16 B. 132; *Weale v. Ollive*, 32 B. 421.

The fact that legacies are given at the decease of the person, to whom the income is given indefinitely, will only cut down the absolute interest to the extent of the legacies. *Jennings v. Bailly*, 17 B. 118.

Upon similar principles, a gift of income to A. for life, and then to B. indefinitely, gives B. the absolute interest. *Clough v. Wynne*, 2 Mad. 188.

Contrary intention.

But a gift of income to B. and C. and the survivor of them gives them only life interests. *Blann v. Bell*, 2 D. M. & G. 775; see *In re Tandy*; *Tandy v. Tandy*, 34 W. R. 748.

### III. PROPERTY AND POWER.

Gift to be at the disposal of a person.

1. A gift to be at the disposal of A. is an absolute gift. *Nowlan v. Walsh*, 4 De G. & S. 584; *Re Maxwell's Will*, 24 B. 246; *Hoy v. Master*, 6 Sim. 568; *Kellett v. Kellett*, L. R. 3 H. L. 160.

The same construction has been adopted where property has been directed to be at the disposal of A. by will, or after his death (a); and where the gift was to A. to be by her enjoyed absolutely during her life and disposed of as she shall think fit at her death, with no gift in default of appointment (b). *Robinson v. Dugate*, 2 Vern. 180; *Hiron v. Oliver*, 13 Ves. 108 (a); *In re David's Trusts*, Jo. 495 (b).

Effect of a power super-added to an absolute gift.

2. If there is a gift to A. in general terms, a superadded power to dispose of the property in question by will, or at the donee's death, does not cut down the absolute gift. *Southouse v. Bate*, 16 B. 132; *Weale v. Ollive*, 32 B. 421; *Comber v. Graham*, 1 R. & M. 450; *Re Mortlock's Trust*, 3 K. & J. 456. See *Hales v. Margerum*, 3 Ves. 299; and *Bull v. Kingston*, 1 Mer. 314.

So a devise of lands in fee to the intent that the devisee may enjoy the same for life and by will dispose of the same, gives the devisee the fee. *Doe d. Herbert v. Thomas*, 3 A. & E. 123.

And even a superadded power to dispose of the property among a particular class will not cut down the absolute



interest previously given. *Howarth v. Dewell*, 29 B. 18; *Chap. XXXII.*  
*Brook v. Brook*, 3 Sm. & G. 280; *Reeves v. Baker*, 18 B. 372.

Of course a mere power to dispose of property among a certain class gives no property to the donee of the power. *Birch v. Wade*, 3 V. & B. 198; *Blakeney v. Blakeney*, 6 Sim. 52. See *Acheson v. Fair*, 3 Dr. & War. 512.

3. But if the gift is to A. for life, with a superadded power to dispose of the whole for his own benefit, A. takes only a life interest if he does not exercise the power. *Archibald v. Wright*, 9 Sim. 161; *Bradley v. Westcott*, 13 Ves. 445; *Reith v. Seymour*, 4 Russ. 263; *Scott v. Josselyn*, 36 B. 174; *Pennock v. Pennock*, 13 Eq. 144; *In re Stringer's Estate*; *Shaw v. Jones-Ford*, 6 Ch. D. 1; *In re Thomson's Estate*; *Herring v. Barrow*, 14 Ch. D. 263; *In re Pounder*; *Williams v. Pounder*, 56 L. J. Ch. 113; 56 L. T. 104.

Effect of a power super-added to a life interest.

And when the tenant for life has power to go to the principal, only if the income is insufficient, she is entitled only to so much of the capital as will afford a suitable maintenance. *Re Pedrotti's Will*, 27 B. 583; see *Re Fox*; *Fox v. Fox*, 62 L. T. 762.

4. A gift to A. for life with remainder as A. shall by deed or will (a), or by will only (b), appoint, with a limitation in default of appointment to his executors and administrators, is an absolute gift, and the fund may be paid over to the legatee without an appointment. *Holloway v. Clarkson*, 2 Ha. 521; *Cambridge v. Rous*, 25 B. 574 (a); *Devall v. Dickens*, 9 Jur. 550; *Page v. Soper*, 11 Ha. 321; *In re Onslow*; *Plowden v. Gayford*, 39 Ch. D. 622; *In re Darenport*; *Turner v. King*, (1895) 1 Ch. 361 (b).

Gifts for life with power to appoint and in default to executors.

Where a father is tenant for life, with power to appoint to his children, who take absolutely in equal shares in default of appointment, and a child dies intestate so that the father becomes entitled to his share in default of appointment, the father on surrendering his life interest and releasing his power so far as that child's share is concerned, is entitled to payment of the share. *Smith v. Houblon*, 26 B. 482; *In re Radcliffe*; *Radcliffe v. Bewes*, (1892) 1 Ch. 227, not following *Cunynghame v. Thurlow*, 1 R. & M. 436, n.

Life tenant with power to appoint absolutely entitled to a share subject to the power.

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## IV. EFFECT OF SUBSEQUENT RESTRICTIONS UPON ABSOLUTE INTERESTS.

In some cases there is an absolute gift in the first instance, out of which particular interests are subsequently carved. In such cases the rule is:—

Absolute interests cut down for a particular purpose remain so far as those purposes do not take effect.

“If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee’s enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails. But if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator’s estate, as not having in such event been given away from it. In the latter case the gift is only for a particular purpose; in the former the purpose is the benefit of the legatee as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator’s estate, but already the property of the legatee.” Per Lord Cottenham, *Lassence v. Tierney*, 1 Mac. & G. 551.

Thus, if there is an absolute gift by a will, and restrictions are imposed upon the legatee’s enjoyment by a codicil, the absolute gift remains so far as the restrictions do not extend. *Norman v. Kynaston*, 3 D. F. & J. 29; *Watkins v. Weston*, 3 D. J. & S. 434.

So when there is a valid appointment to objects of a power, with limitations or restrictions which are beyond the power, the invalid restrictions may be rejected. *Stephen v. Gadsden*, 20 B. 463; *Gerrard v. Butler*, *ib.* 541; *Churchill v. Churchill*, 5 Eq. 44; *Webb v. Sadler*, 14 Eq. 533; 8 Ch. 419.

But where there is no absolute gift, the legatees can take no more than is given them. *Savage v. Tyers*, 7 Ch. 356.

What is an absolute gift in the first instance.

The difficulty in these cases lies in ascertaining, whether there is an absolute gift in the first instance or not. The question is whether the original gift is qualified by the words in which it is given: *Scaurin v. Watson*, 10 B. 200; *Gompertz v. Gompertz*, 2 Ph. 107; *Lassence v. Tierney*, 1 Mac. & G. 551;

*Harris v. Newton*, 25 W. R. 228; 46 L. J. Ch. 268; *Re Richards*; Chap. XXXII. *Williams v. Gorvin*; 50 L. T. 22; or whether there is an independent gift with a direction as to the mode of its enjoyment. *Campbell v. Brownrigg*, 1 Ph. 301; *Whittell v. Dudin*, 2 J. & W. 279; *Winckworth v. Winckworth*, 8 B. 576; *Mayer v. Townshend*, 3 B. 448; *McTear v. McDowell*, 11 Ir. Ch. 388; *Welpley v. Cormick*, 16 Ir. Ch. 74; *Kellett v. Kellett*, L. R. 8 H. L. 160.

### V. GIFTS BENEFICIAL OR IN TRUST.

The proper words to create a trust are upon or in trust. But no particular words are necessary. Thus, a gift for a purpose, or to the intent that, or upon condition, may create a trust. *Corporation of Gloucester v. Wood*, 3 Ha. 131; 1 H. L. 272; *Aston v. Wood*, 6 Eq. 419; *Bird v. Harris*, 9 Eq. 204; *Merchant Taylors' Co. v. A.-G.*, 6 Ch. 512; *A.-G. v. Wax Chandlers' Co.*, L. R. 6 H. L. 1.

Words to  
create a trust.

And a gift of the residue to a person who is executor "to enable him to carry into effect the purposes" of the will is a trust. *Barrs v. Feckes*, 2 H. & M. 61.

"To enable."

Expressions amounting to no more than a declaration of the motive of the testator in making a gift, as, for instance, that it is made to enable the donee to support his or her children, will not raise a trust. *Benson v. Whittam*, 5 Sim. 22; *Thorp v. Owen*, 2 Ha. 607; *Biddles v. Biddles*, 16 Sim. 1; *Byne v. Blackburn*, 26 B. 41; *Mackett v. Mackett*, 14 Eq. 49; *Farr v. Hennis*, 44 L. T. 202; *Ryan v. Keogh*, 1 R. 4 Eq. 357.

Declaration  
of motive.

If the gift is to a person subject to the performance of certain trusts, the donee *primâ facie* takes beneficially subject to those trusts, and this construction is assisted if the donee is a person whom the testator may be expected to provide for and he is not an executor or trustee. *King v. Denison*, 1 V. & B. 261; *Smith d. Denison v. King*, 16 East, 283; *Cary v. Cary*, 2 Sch. & L. 173; see 2 H. & M. p. 66; *Fenton v. Hawkins*, 9 W. R. 300; *Clarke v. Hilton*, L. R. 2 Eq. 810.

Gift subject  
to trusts.

If there is a gift intended to be beneficial to the legatee, and an obligation is then imposed on the legatee which does not exhaust the subject-matter of the gift, the effect is the same

**Chap. XXXII.** as if it were a gift subject to the obligation. *Wood v. Cox*, 2 M. & Cr. 684; *Shelley v. Skelley*, 6 Eq. 540; *Irrine v. Sullivan*, 8 Eq. 678.

Gift to trustees subject to trusts.

The case is more difficult if there is a gift to several persons as joint tenants subject to trusts and those persons are also executors or trustees of the will. In such a case the donees *primâ facie* do not take beneficially, though there may be expressions in the will sufficient to give them the beneficial interest subject to the performance of the trusts. *Dawson v. Clarke*, 15 Ves. 409; 18 Ves. 247; *Saltmarsh v. Barrett*, 3 D. F. & J. 279.

Gift upon trust.

If the gift is upon trust, *primâ facie* the donee can take nothing beneficially, though the trusts declared may not exhaust the property. *Wyeh v. Packington*, 3 B. P. C. 44; *Hobart v. Countess of Suffolk*, 2 Vern. 644; *Countess of Bristol v. Hungerford*, *ib.* 645; *Southouse v. Bate*, 2 V. & B. 396; *Watson v. Hayes*, 5 M. & Cr. 125; *Mullen v. Bowman*, 1 Coll. 197; *Andrew v. Andrew*, 1 Coll. 686; *Love v. Gaze*, 8 B. 472; *Ellicock v. Mapp*, 3 H. L. 492; *In re West*; *George v. Grose*, (1900) 1 Ch. 84.

Evidence to rebut trust not admissible.

And if the proper construction of the will is that there is a trust, evidence is not admissible to show that the trustee was intended to take beneficially. *Irrine v. Sullivan*, 8 Eq. 678; *Croome v. Croome*, 59 L. T. 582.

When trustee takes beneficially.

But the question is one of construction upon the whole will, and where the donee in trust is a wife or relative whom the testator may be supposed to have intended to provide for and there are other circumstances to assist the construction, the proper conclusion may be that the donee is to take subject only to the partial trusts declared. *Conningham v. Mellish*, Prec. Ch. 31; Eq. Ab. 273, pl. 8; 2 Vern. 247; *Hughes v. Evans*, 13 Sim. 496; *Williams v. Roberts*, 4 Jur. N. S. 18; 27 L. J. Ch. 177; *Croome v. Croome*, 59 L. T. 582; 61 L. T. 814.

Words indicating an intention that the donee is to take beneficially, such as for his own use and benefit, or absolutely (*a*), are of course of great weight in rebutting a trust; but a separate use added to a gift to a woman (*b*) does not necessarily prevent her from taking as trustee. *Wood v. Cox*, 2

M. & Cr. 684; *Irvine v. Sullivan*, 8 Eq. 673 (a); *Stubbs v. Sargon*, 3 M. & Cr. 507; *In re Haly's Trusts*, 23 L. R. Ir. 130 (b). Chap. XXXII.

If the testator does not use language clearly imposing a trust, it must be ascertained, from a consideration of the whole will, whether an imperative obligation was intended to be imposed or not. Trust inferred from precatory words.

There is a long list of cases in which words of confidence, request, desire, and the like, following a gift, have been construed as imposing a trust on the legatee. "In some of the older cases obligations were inferred from language which in modern times would be thought insufficient to justify such an inference" (per *Lindley*, M.R.; *In re Williams*, (1897) 2 Ch. 12, p. 18); and the modern cases appear to show that such words will *prima facie* not create a trust.

Thus a gift followed by such expressions as in "full confidence," or in "full trust and confidence," or "well knowing," or the expression of a desire, or request, or wish that the legatee will dispose of the property in accordance with the testator's wishes, or even in a certain specified manner, will not now impose a trust on the donee. *Stead v. Mellor*, 5 Ch. D. 225; *In re Hutchinson & Tenant*, 8 Ch. D. 541; *In re Adams & Kensington Vestry*, 27 Ch. D. 394; *In re Diggles*; *Gregory v. Edmondson*, 39 Ch. D. 253; *Clancarty v. Clancarty*, 31 L. R. Ir. 530; *In re Hamilton*; *Trench v. Hamilton*, (1895) 2 Ch. 370; *In re Williams*; *Williams v. Williams*, (1897) 2 Ch. 12; *Hill v. Hill*, (1897) 1 Q. B. 483. *Briggs v. Penny*, 3 De G. & S. 525; 3 Mac. & G. 546, is criticised in *Stead v. Mellor*, *supra*. *Curnick v. Tucker*, 17 Eq. 320; *Le Marchant v. Le Marchant*, 18 Eq. 414, were not approved in *In re Hutchinson & Tenant*, *supra*.

Such cases as *Ware v. Mallard*, 21 L. J. Ch. 355; 16 Jur. 492; *Gully v. Cregoe*, 24 B. 185; *Shovelton v. Shovelton*, 32 B. 143, are not easily reconcilable with *Webb v. Wools*, 2 Sim. N. S. 267; and their authority is still further diminished by the more recent cases.

In the older cases the following words have been held sufficient to create a trust:

- a. Words of confidence, such as "trusting:" *Baker v.* Words of confidence.

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**Chap. XXXII.** *Mosley*, 12 Jur. 740 ; *Irvine v. Sullivan*, 8 Eq. 673 ; “confiding :” *Griffiths v. Evans*, 5 B. 241 ; “not doubting :” *Parsons v. Baker*, 18 Ves. 476 ; “firm conviction :” *Barnes v. Grant*, 2 Jur. N. S. 1127 ; 26 L. J. Ch. 92 ; “full belief :” *Fordham v. Speight*, 23 W. R. 782.

Words of  
request.

b. Words of request and entreaty, such as “entreat :” *Prevost v. Clarke*, 2 Mad. 458 ; “require and entreat :” *Taylor v. George*, 2 V. & B. 378 ; “wish and request :” *Foley v. Parry*, 5 Sim. 138 ; 2 M. & K. 138 ; “dying request :” *Pierson v. Garnet*, 2 B. C. C. 38, 226 ; “request :” *Eade v. Eade*, 5 Mad. 118 ; “beg :” *Corbet v. Corbet*, 1 R. 7 Eq. 456 ; “dying wish :” *Godfrey v. Godfrey*, 11 W. R. 554 ; “last will :” *Hinxman v. Poynder*, 5 Sim. 546 ; “wish and desire :” *Liddard v. Liddard*, 2 B. 226 ; see *Teasdale v. Braithwaite*, 5 Ch. D. 630 ; “desire :” *Harding v. Glyn*, 1 Atk. 469.

Words of  
advice.

c. Even words of advice and recommendation, such as “advise :” *Parker v. Bolton*, 5 L. J. Ch. 98 ; “recommend :” *Tibbets v. Tibbets*, 19 Ves. 656 ; Jac. 317 ; *Horwood v. West*, 1 S. & St. 387 ; *Ford v. Fowler*, 3 B. 146 ; *Malim v. Keighley*, 3 Ves. Jun. 333, 529.

Where a precatory trust was established in favour of children, it was held that the trustee could attach a separate use to the shares of females. *Willis v. Kymer*, 7 Ch. D. 181.

Trust not  
created by  
precatory  
words if  
property or  
objects uncer-  
tain.

But though words of doubtful meaning may impose a trust, it is clear that they will not do so if the language used leaves it uncertain either what the legatee is to do, or what property is to be applied in doing it, or in whose favour the application is to be made.

Uncertainty  
as to what is  
to be done,

a. Therefore mere expressions of a desire that the donee will be kind to: *Buggins v. Yates*, 9 Mod. 122 ; 8 Vin. Ab. 72, pl. 27 ; remember: *Bardswell v. Bardswell*, 9 Sim. 219 ; consider: *Sale v. Moore*, 1 Sim. 534 ; deal justly by: *Pope v. Pope*, 10 Sim. 1 ; educate and provide for: *Macnab v. Whitbread*, 17 B. 299 ; *Winch v. Brutton*, 14 Sim. 379 ; *Fox v. Fox*, 27 B. 301 ; *Morrin v. Morrin*, 19 L. R. Ir. 37 ; take care of: *In re Moore* ; *Moore v. Roche*, 55 L. J. Ch. 418 ; 54 L. T. 231 ; 34 W. R. 343 ; or do justice to: *Ellis v. Ellis*, 23 W. R. 382, a certain class of persons, will raise no trust.

b. Though some property may be mentioned out of which the trust is to be performed, this is not enough, if it is not clear what the property is; as if the donee is requested to give "whatever she can transfer": *Flint v. Hughes*, 6 B. 342; or the bulk: *Palmer v. Simmonds*, 2 Dr. 221; or "when no longer required by her": *Mussoorie Bank v. Raynor*, 7 App. C. 321, P. C.; or if the precatory words apply not only to the property given by the testator, but to all the property of the legatee: *Eade v. Eade*, 5 Mad. 118; *Lechmere v. Lavie*, 2 M. & K. 197; *Parnall v. Parnall*, 9 Ch. D. 96, see *Knight v. Boughton*, 3 B. 148; 11 Cl. & F. 513: or only to so much as the legatee does not dispose of. *Bland v. Bland*, 2 Cox, 349; *Wilson v. Major*, 11 Ves. 205; *Pushman v. Fülliter*, 3 Ves. 7; *Cowman v. Harrison*, 10 Ha. 234; *Green v. Marsden*, 1 Dr. 646; see *In re Pounder*, 56 L. J. Ch. 113.

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as to property;

c. If the donee has a wide discretion as to the objects to be benefited, so that it is uncertain whom the testator meant, the Court will infer that precatory words were not intended to create an imperative trust. *Bernard v. Minshull*, Jo. 276, 287.

as to objects.

Thus, where there is absolute power of disposal, with a confidence expressed, that the donee will dispose of the property according to the testator's wishes, where none are expressed, there is no trust. *Reid v. Atkinson*, I. R. 5 Eq. 162, 373; *Creagh v. Murphy*, I. R. 7 Eq. 182.

Though words are used, such as "family," "relations," or "heirs," to which the Court would give a meaning in a direct gift, no trust will be implied if it is uncertain what the testator meant by them. *Harland v. Trigg*, 1 B. C. C. 142; *Wright v. Atkyns*, 17 Ves. 255; 1 V. & B. 313; 19 Ves. 299; T. & R. 143; Sug. Prop. 388; *Williams v. Williams*, 1 Sim. N. S. 358; *Green v. Marsden*, 1 Dr. 646; *Meredith v. Henneage*, 1 Sim. 542; *Greene v. Greene*, I. R. 3 Eq. 90, 629.

No trust will be implied from precatory words:

a. Where the donee may at his discretion apply the property to other purposes. *Lefroy v. Flood*, 4 Ir. Ch. 1; *Curtis v. Rippon*, 5 Mad. 434; *House v. House*, 23 W. R. 22; *Ex parte Payne*, 2 Y. & C. Ex. 636.

Precatory words may be explained so as not to raise a trust.

b. Or where there is an express direction that the donee's

Chap. XXXII. absolute interest is not to be curtailed. *Huskisson v. Bridge*, 15 Jur. 738; *Eaton v. Watts*, 4 Eq. 151.

c. Where the precatory words are stated not to be obligatory. *Young v. Martin*, 2 Y. & C. C. 582; *Shepherd v. Nottidge*, 2 J. & H. 766; *In re Bond*; *Cole v. Hawes*, 4 Ch. D. 238.

d. Or where the donee is to take free and unfettered. *Meredith v. Heneage*, 1 Sim. 542; 10 Pr. 306; *Hoy v. Master*, 6 Sim. 568; *White v. Briggs*, 15 Sim. 33.

Gift to parent for benefit of himself and children.

The decisions upon gifts to a parent for the benefit of himself and his children run into fine distinctions.

It may be that the parent takes absolutely, or that he takes subject to some obligation to the children, or that he and the children take concurrent interests, or that the parent takes for life with remainder to the children (see *ante*, p. 356), or that he is a mere trustee for the children and takes nothing beneficially.

Gift to be at disposal of parent.

A gift to the testator's widow to be at her disposal in any way she may think best for the benefit of herself and family imposes no trust upon the widow. The widow is to be the judge of what she is to have and what the children are to have, and that is a trust which the Court will not execute. *Lambe v. Eames*, 6 Ch. 597, where *Crockett v. Crockett*, 2 Ph. 553, is considered; *M'Alinden v. M'Alinden*, 1 R. 11 Eq. 219; *Morrin v. Morrin*, 19 L. R. Ir. 37; see *Webb v. Woods*, 2 Sim. N. S. 267.

When parent takes as trustee with discretionary powers.

On the other hand, the gift may be so expressed as to impose on the parent some trust for the benefit of the children, though he may have a discretion as to the interest which the children are to take. *Raikes v. Ward*, 1 Ha. 445; *Conolly v. Farrell*, 8 B. 347; *Woods v. Woods*, 1 M. & Cr. 401; *Godfrey v. Godfrey*, 2 N. R. 16; 11 W. R. 554; *Hart v. Tribe*, 32 B. 279; 1 D. J. & S. 418; *Bibby v. Thompson*, 32 B. 646; *In re Haly's Trusts*, 23 L. R. Ir. 130.

Or the parent may take for life with power to appoint to the children. *Evans v. Evans*, 12 W. R. 508; *Talbot v. O'Sullivan*, 6 L. R. Ir. 302; see *In re Rae*, 1 L. R. Ir. 174.

When parent trustee only.

Again, the parent may take merely as a trustee for his children. If, for instance, the gift is to the parent to be



disposed of among the children, or to be appropriated for the children, or similar expressions. *Blakeney v. Blakeney*, 6 Sim. 52; *Wetherell v. Wilson*, 1 Kee. 80; *Pilcher v. Randall*, 9 W. R. 251; *In re Roper's Trusts*, 11 Ch. D. 272; 40 L. T. 97; *In re Haly's Trusts*, 28 L. R. Ir. 130. Chap. XXXII.

When the gift is to the parent for the maintenance of the children, if the maintenance of the children can be looked upon as the motive of the gift, the parent takes absolutely. *Brown v. Casamajor*, 4 Ves. 498; *Hammond v. Neame*, 1 Sw. 35 (a strong case); *Boul v. Dickinson*, 33 L. T. 221; see *Briggs v. Sharp*, 20 Eq. 317, and cases cited *supra*. Gift for maintenance.

Again, the gift may be so expressed as to entitle the parent to the gift subject to the obligation of maintaining the children so far as they require it. Gift subject to obligation to maintain.

This is the case if the gift is to the testator's widow for her use and benefit and for the maintenance of his children, or to her subject to the obligation of maintaining the children.

In such cases the Court will not interfere with the parent's discretion so long as it is honestly exercised. But it will, if necessary, administer the trust and direct an inquiry to bring out the facts.

If the will does not impose a limit, maintenance may be allowed to a child requiring it who has attained twenty-one, and also to a married daughter. *Costabadie v. Costabadie*, 6 Ha. 410; *Longmore v. Elcum*, 2 Y. & C. C. 363; *Conolly v. Farrell*, 8 B. 347; *Carr v. Living*, 28 B. 654; 33 B. 474; *Scott v. Key*, 35 B. 291; *Berry v. Briant*, 2 Dr. & S. 1; *In re Booth*; *Booth v. Booth*, (1894) 2 Ch. 282; *In re G.*, (1899) 1 Ch. 719; see *Camden v. Benson*, 4 L. J. N. S. 256; and *Bowden v. Laing*, 14 Sim. 113, where a married daughter was held not entitled to maintenance.

A mother living in adultery, though she supports her children, will not be considered as properly performing the obligation cast upon her by the will, and the Court will in such a case administer the fund. *Castle v. Castle*, 1 De G. & J. 532; *In re G.*, *supra*.

Where the interest upon legacies given to children is directed to be paid to their parents, and applied by them for Gifts to the parent to be applied for

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the main-  
tenance of his  
children.

their maintenance, the parents take subject to no account. *Hammond v. Neame*, 1 Sw. 35; *Berkeley v. Swinburne*, 6 Sim. 613; *Hadow v. Hadow*, 9 Sim. 438; *Broune v. Paull*, 1 Sim. N. S. 92.

And a gift to the parent for the benefit or maintenance of himself and his children may be paid to the parent. *Cooper v. Thornton*, 3 B. C. C. 96, 186; *Robinson v. Tickell*, 8 Ves. 142; *Re Robertson's Trust*, 6 W. R. 405.

# VI. LEGACIES GIVEN TO BENEFIT A LEGATEE IN A PARTICULAR WAY.

Legacy to a  
legatee to be  
applied in a  
particular  
way for the  
benefit of the  
legatee.

1. A legacy given to a person for a particular purpose for the benefit of the legatee, as to bind him apprentice (*a*); to purchase a house (*b*); to establish a business (*c*); to purchase a commission (*d*); to pay off a mortgage (*e*); to carry on mines which the testator sells (*f*), is good though the purpose fails or becomes incapable of execution. *Barlow v. Grant*, 1 Vern. 255; *Nerill v. Nerill*, 2 Vern. 431; *Barton v. Cooke*, 5 Ves. 462 (*a*); *Knor v. Hotham*, 15 Sim. 82 (*b*); *Gough v. Bult*, 16 Sim. 45 (*c*); *Leche v. Lord Kilmorey*, T. & R. 207; *Cope v. Wilmot*, 1 Coll. 396; *Palmer v. Flower*, 13 Eq. 250 (*d*); *Lockhart v. Hardy*, 9 B. 379; *Adams v. Loddell*, 25 L. R. Ir. 311 (*e*); *Parsons v. Coke*, 6 W. R. 715 (*f*).

Under a trust to lay out 5,000*l.* in planting trees on a settled estate, the 5,000*l.* was held to belong to the owners of the estate. *In re Bowes*; *Earl Strathmore v. Vane*, (1896) 1 Ch. 507.

And the interest of a fund directed to be set aside to pay the rent of leaseholds settled by the will, which had to be sold, was held payable to the person who would have been tenant for life of the leaseholds. *Earl of Lonsdale v. Countess of Berchtoldt*, 3 K. & J. 185.

The legacy will not be cut down to the amount actually required for the named purpose, unless the surplus, after satisfying that purpose, is expressly given over. *In re Lee's Trusts*, 1 I. R. 10 Eq. 157.

Distinction  
where the  
purpose is not

2. If the purpose for which the money is given is not merely the benefit of the legatee, but also the gratification of some

wish of the testator, the question is, which is the primary object. *Re Skinner's Trust*, 1 J. & H. 102. **Chap. XXXII.**

merely the benefit of the legatee.

## VII. DISCRETIONARY TRUSTS.

1. A gift to trustees upon trust to dispose of the same as they think fit is too uncertain to be carried out by the Court, and is therefore void. *Fowler v. Garlike*, 1 R. & M. 232; *Ellis v. Selby*, 1 M. & Cr. 294; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *Fenton v. Nevin*, 31 L. R. Ir. 478; see *Gibbs v. Rumsey*, 2 V. & B. 294. Discretion if too wide is void.

2. If a discretion is given to trustees to apply a fund for the benefit of an individual, and the mode of application is so wide as to lead to the inference that the primary object was to benefit the individual, he may be entitled to the fund, though the trustees do not exercise their discretion, or the individual to be benefited dies before they can do so. This may be the case, even if there is a gift over of so much as is not applied. *Gough v. Bult*, 16 Sim. 45; *Gude v. Worthington*, 3 De G. & S. 389; *In re Johnston*; *Mills v. Johnston*, (1894) 3 Ch. 204. Wide discretion given for benefit of an individual.

3. In some cases upon informal wills a power given to trustees to apply a sum for a legatee in a particular way has been held equivalent to a power of advancement, under which a legatee cannot claim anything not wanted for the purpose. *Lewis v. Lewis*, 1 Cox, 162; *Robinson v. Cleator*, 15 Ves. 526; *Cooper v. Mantell*, 22 B. 231; *In re Ward's Trusts*, 7 Ch. 726. Discretion equivalent to power of advancement.

4. Testators sometimes desire that a fund shall be applied only for the personal benefit of the legatee, so that it cannot be alienated by him or taken by his creditors. This object can be attained by means of a discretionary trust. If the trust is properly penned, the legatee will be entitled only to so much as the trustees in their discretion think fit to apply for the purpose mentioned by the testator. If the trustees refuse to exercise their discretion, or do not exercise it fairly, the Court will inquire how much ought to be applied. Intention to secure the personal benefit of a legatee.

Thus a trust to apply the whole or any part of the income or capital of a fund for the maintenance of A. does not entitle him to more than is required for the purpose, and if the fund is reversionary, and A. dies before it falls into possession, his

**Chap. XXXII.** legal personal representatives are not entitled to anything. *In re Sanderson's Trust*, 3 K. & J. 497; *Re Stanger*; *Moorsom v. Tate*, 64 L. T. 698; 60 L. J. Ch. 826; 39 W. R. 455.

Protected  
life interests.

5. Questions of a similar kind arise upon protected life interests, where income payable to a tenant for life is given to trustees upon a discretionary trust in the event of alienation by, or bankruptcy of the tenant for life.

Income to be  
applied for  
benefit of one  
object.

a. If there is a trust to apply the income of property for the maintenance and support of one person, and the trustees have only a discretion as to the mode of application but cannot deprive the beneficiary of any part of the income, the income passes to his alienee or trustee in bankruptcy. *Green v. Spicer*, 1 R. & M. 395; *Younghusband v. Gisborne*, 1 Coll. 400.

Discretion  
to apply  
income for  
one or more  
persons.

b. Where, under a similar trust, the trustees have a discretion to accumulate the whole or part of the income for the benefit of persons other than the original beneficiary, the income does not pass to his alienee or trustee in bankruptcy. *Snowden v. Dales*, 6 Sim. 524; *Twopeny v. Peyton*, 10 Sim. 487; *Re Bullock*; *Good v. Lickorish*, 60 L. J. Ch. 341; 64 L. T. 736; 39 W. R. 472.

But in such a case, if the trustees pay or deliver money or goods to the beneficiary, or appropriate money or goods to be paid or delivered to him, the money or goods pass to his alienee. *In re Coleman*; *Henry v. Strong*, 39 Ch. D. 443; *Re Neil*; *Hemming v. Neil*, 62 L. T. 649; see *In re Ashby*; *Ex parte Wreford*, (1892) 1 Q. B. 872.

Income to be  
applied for  
benefit of a  
class.

c. Where there is a trust for the benefit of a class, no member of which can be excluded from the benefits of the trust, so much of the income as is properly applicable for the benefit of any member goes to his alienee. Thus, where there is a trust for the maintenance and support of A., his wife and children, and A. alienates his interest, either before the trust arises or during its continuance, A.'s alienee will be entitled to so much of the income as is not required for the maintenance and support of A.'s wife and children. *Page v. Way*, 3 B. 20; *Kearsley v. Woodcock*, 3 Ha. 185;

*Wallace v. Anderson*, 16 B. 533. *Godden v. Crowhurst* (10 Sim. 642) went too far in giving nothing to the assignee in bankruptcy; *Rippon v. Norton* (2 B. 63) is wrong; see *In re Coleman*, 39 Ch. D. 443, p. 448. Chap. XXXII.

d. But where a trust for the benefit of a class is exclusive, so that the trustees are not bound to employ any part of the income for the benefit of any one member, so much only of the income goes to the alienee of a member as the trustees pay or appropriate for payment to him. *In re Coleman*, *supra*. A trust for the maintenance of A., his wife and children, or any of them, is an exclusive trust within this rule. *Lord v. Bunn*, 2 Y. & C. C. 98; *Holmes v. Penney*, 3 K. & J. 90; *Re Neil*; *Hemming v. Neil*, 62 L. T. 649. Power of selection among members of a class.

6. Where trustees have a discretionary power enabling them to defeat a previous vested gift, the discretion may be exercised after the alienation or bankruptcy of the beneficiary, although, if it is not exercised, an absolute interest in the property would pass to the alienee. *Coe's Trust*, 4 K. & J. 199; *Chambers v. Smith*, 3 App. C. 795. Duration of discretion.

7. Where a discretionary trust arises upon alienation, the discretionary trust does not affect income which has become due before alienation, or is in the hands of the trustees ready for application before that time. *In re Sampson*; *Sampson v. Sampson*, (1896) 1 Ch. 630. Time from which discretionary trust takes effect.

## CHAPTER XXXIII.

## GIFTS OF ANNUITIES.

## I. CHARACTERISTICS OF ANNUITIES.

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Annuity and  
rent-charge  
distinguished.

AN annuity charged upon lands devised in fee is a legal rent-charge, even though it may be given to a person, his executors and administrators. *Ramsay v. Thorngate*, 16 Sim. 575; see *Martin v. Haynes*, 29 L. R. Ir. 416.

A gift of a rent-charge without more charges all the testator's lands. *Ex parte McDowal*, 5 Jur. N. S. 558.

Annuity  
charged on  
land.

A gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable. *Lomax v. Lomax*, 16 B. 290; *Shipperdson v. Tower*, 1 Y. & C. C. 441; *Patching v. Barnett*, 51 L. J. Ch. 74; *Buckley v. Buckley*, 19 L. R. Ir. 544; *Greer v. Waring*, (1896) 1 Ir. 427.

In such a case a right to distrain is attached to the annuity by statute 4 Geo. II. c. 28, s. 5. *Buttery v. Robinson*, 3 Bing. 392; *Sollory v. Leaver*, 9 Eq. 22; *Kelsey v. Kelsey*, 17 Eq. 496; and see the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 44).

Charge on  
reversion.

An annuity may be given so as to be a charge only upon a reversion, though it is to commence from the testator's death. *Jackson v. Hamilton*, 9 Ir. Eq. 430; 3 J. & Lat. 702; *In re Williams*, 64 L. J. Ch. 349.

Rent-charge  
does not abate  
if some of the  
land taken  
by title  
paramount.

If a rent-charge is given charged upon certain land devised by the will, and it turns out that part of the land did not belong to the testator, the devisee of the rest must bear the whole rent-charge. The rent-charge does not abate in proportion to the diminished value of the land. *Roche v. Jordan*, (1896) 1 Ir. 494, not following *Jackson v. Hamilton*, 9 Ir. Eq. 430; 3 J. & Lat. 702.

But if A. upon a grant of land to B. reserves to himself a rent-charge, and B. is evicted from part of the land, the rent-charge will be apportioned. *Hartley v. Maddocks*, (1899) 2 Ch. 199.

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Where property is given subject to an annuity, the annuitant is not entitled to have the property sold and secured as long as the annuity is properly paid. *Re Potter; Potter v. Potter*, 50 L. T. 8; *In re Parry; Scott v. Leak*, 42 Ch. D. 570.

Security for  
annuity.

An annuitant whose annuity is charged upon the income of the residuary estate is entitled to have a sufficient sum set aside in 2½ per cent. consols to secure the annuity, and subject to that the residue will be distributed. *Harbin v. Masterman*, (1896) 1 Ch. 351.

Arrears of an annuity charged on the corpus of land and arrears of a simple rent-charge may be raised by mortgage or sale of the land. *Cupit v. Jackson*, 13 Pr. 371; *Graves v. Hicks*, 11 Sim. 536, 551; *White v. James*, 26 B. 191; *Scottish Widows' Fund v. Craig*, 20 Ch. D. 208; *In re Tucker; Tucker v. Tucker*, (1893) 2 Ch. 323; *Hambro v. Hambro*, (1894) 2 Ch. 564; *In re Owen*, 43 W. R. 55.

Raising  
arrears by  
sale or  
mortgage.

In *Sollory v. Leaver* it was held that an annuitant whose annuity had fallen into arrear was not entitled to a receiver, on the ground that he had a sufficient remedy by distress. A receiver would, however, probably now be appointed in such a case under sect. 25 (8) of the Judicature Act, 1873.

Right to  
receiver.

An annuitant cannot claim against the devisee in possession an account of back rents accrued before a receiver was appointed. *Garfitt v. Allen*, 37 Ch. D. 48; see *In re Marquis of Anglesea; Paget v. Anglesea*, 17 Eq. 283.

Account of  
back rents.

An annuitant whose annuity is charged upon freeholds and residue is entitled to have the estate administered in order to ascertain the residue. *Wollaston v. Wollaston*, 7 Ch. D. 58.

Right to  
administer.

A rent-charge, though charged upon realty and personalty, will be looked upon as issuing out of the realty alone. *Butt's Case*, 7 Rep. 23a; Co. Litt. 147a; *Richardson v. Nixon*, 7 Ir. Eq. 620; *Sollory v. Leaver*, 9 Eq. 22.

The rule in *Shelley's Case* and the other technical rules of construction apply to the limitations of a rent-charge. *Drew v. Barry*, I. R. 7 Eq. 413; 8 *ib.* 260.

The rule in  
*Shelley's Case*  
applies to  
rent-charges.

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A rent-charge is entailable, but if an estate tail is created in a rent-charge, and no remainder in fee is limited, the tenant in tail cannot create more than a base fee. *Co. Litt.* 298a, note 2; *Chaplin v. Chaplin*, 3 P. W. 229.

Annuity to A. and his heirs.

An annuity, given out of personal assets, if given with words of inheritance, will devolve like real estate.

Annuities are not within the *Statute de Donis*.

Such an annuity, however, not being within the *Statute de Donis*, cannot be entailed. A devise, therefore, of a personal annuity to A. and the heirs of his body, gives A. a fee simple conditional. *Earl of Stafford v. Buckley*, 2 Ves. Sen. 170; *Turner v. Turner*, Amb. 776; 1 B. C. C. 316.

Annuity given to a man and his heirs remains personalty except for purposes of devolution.

But an annuity, though given with words of inheritance, is, for all other purposes than descent, personalty. *Earl of Stafford v. Buckley*, 2 Ves. Sen. 170; *Lady Holderness v. Lord Carmarthen*, 1 B. C. C. 377; *Aubin v. Daly*, 4 B. & Ald. 59; *Radburn v. Jervis*, 3 B. 450.

And an annuity charged upon real and personal estate, but given without words of limitation appropriate to realty, is personal estate. *Taylor v. Martindale*, 12 Sim. 158; *Parsons v. Parsons*, 8 Eq. 260; *Joynt v. Richards*, 11 L. R. Ir. 278; see *Martin v. Haynes*, 29 L. R. Ir. 416.

Direction to lay out sum in purchase of annuity.

A direction to lay out a specified sum in the purchase of an annuity for the life of A. vests that sum in the annuitant, whether the annuity is in possession or reversion. *Yates v. Compton*, 2 P. W. 308; *Barnes v. Rowley*, 3 Ves. 305; *Bayley v. Bishop*, 9 Ves. 6; *Palmer v. Craufurd*, 3 Sw. 482; see *Smith v. King*, 1 Russ. 363.

Direction to purchase annuity of certain amount.

So if there is a direction to purchase a Government annuity of a given amount, the annuitant is entitled to the purchase-money, though he may die before the time when the annuity was to be purchased. *Darson v. Hearn*, 1 R. & M. 606; *Ford v. Batley*, 17 B. 303; see *In re Mabbett*; *Pitman v. Holborrow*, (1891) 1 Ch. 707.

If the annuitant was a married woman with a restraint on anticipation, the purchase-money nevertheless belongs to her estate. *In re Ross*; *Ashton v. Ross*, (1900) 1 Ch. 162.

What provisions insufficient

The annuitant is entitled to the fund though there may be a direction that he is not to be allowed to accept the value of



the annuity (a); though the trustees are empowered to apply the annuity for the benefit of the annuitant if incapacitated (b); though there is a restraint upon anticipation where the annuitant is not a married woman (c). *Stokes v. Cheek*, 28 B. 620 (a); *Re Browne's Will*, 27 B. 324 (b); *Woodmeston v. Walker*, 2 R. & M. 197 (c); see *Messeena v. Carr*, 9 Eq. 260.

Where annuities were given charged on land which, subject to the annuities, was devised on trust for sale with a direction that the trustees might purchase annuities for the annuitants, the purchase-money to be a first charge on the proceeds of sale of the estates on which the annuities were charged, it was held that the representatives of an annuitant who died before the sale of the land was completed were not entitled to the purchase price of the annuity. *In re Mabbett; Pitman v. Holborrow*, (1891) 1 Ch. 707.

If an annuity is to be bought in the name of the annuitant, a direction that it is to cease on alienation is inconsistent with the absolute ownership previously conferred, and the annuitant may take the purchase-money. *Hunt Foulston v. Furber*, 3 Ch. D. 285; *In re Mabbett; Pitman v. Holborrow*, (1891) 1 Ch. 707.

If the trustees are to buy the annuity in their own names and to pay the same to the annuitant, and there is a direction that it is to fall into residue if the annuitant assigns it, the annuitant is not entitled to the purchase-money, even though he may die before the annuity is purchased without having assigned. *Power v. Hayne*, 8 Eq. 362; *Hatton v. May*, 3 Ch. D. 148; *In re Draper*, 57 L. J. Ch. 942; 58 L. T. 942; 36 W. R. 783; *Day v. Day*, 1 Dr. 569, better reported 22 L. J. Ch. 878; 17 Jur. 586, in which the contrary was held, has not been followed.

In the case of a gift of an annuity with a direction to set apart a fund to secure it, it is clear that the annuitant is not entitled to have the annuity valued and the value paid to him. *Wright v. Callender*, 2 D. M. & G. 652; *Miner v. Baldwin*, 1 Sm. & G. 522.

If, however, the testator's estate is being administered by the Court and proves insufficient to pay the legacies and annuities

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to deprive  
annuitant  
of fund.

Direction to  
buy annuity  
in name of  
annuitant.

Annuity to  
be bought in  
names of  
trustees.

Annuitant is  
not entitled  
to the value  
of his annuity.

Deficient  
estate under  
administra-  
tion.

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given, so that an abatement is necessary, a value will be put upon the annuities as from the testator's death, and the annuitant or his representatives will be entitled to the valued amount after abatement. *Wroughton v. Colquhoun*, 1 De G. & S. 357; *Carr v. Ingleby*, *ib.* 362; *Long v. Hughes*, *ib.* 364.

This principle applies only where the estate is being administered. *In re Nicholson's Estate*, 11 R. 11 Eq. 177.

It has been applied to an annuity determinable on alienation. *In re Sinclair*; *Allen v. Sinclair*, (1897) 1 Ch. 921, not following *Carr v. Ingleby*, *supra*; *Gratrix v. Chambers*, 2 Giff. 321.

It has also been applied to an annuity given to a married woman with a restraint on anticipation. *In re Ross*; *Ashton v. Ross*, (1900) 1 Ch. 162.

If the annuity is charged upon corpus, the tenant for life of the corpus is not entitled to have the annuity valued and the amount paid out of corpus; but sufficient portions of the corpus must be sold from time to time to satisfy the annuity. *In re Grant*; *Walker v. Martineau*, 31 W. R. 703.

## II. THE DURATION OF GIFTS OF ANNUITIES AND ANNUAL SUMS.

### 1. Annuities whether for life or perpetual:

a. When an annuity is given to a person without more, the question arises, whether it was meant to be for life only, or perpetual; and this point, in the case of annuities created *de novo*, is unaffected by sect. 28 of the Wills Act. *Nicholls v. Hawkes*, 10 Ha. 342.

In the case of a deed, it has been decided, that a grant of an annuity given without words of limitation and charged upon freeholds, gives a life interest. The same rule applies if the annuity is charged on freeholds and chattels real. *Butt's Case*, 7 Rep. 23a; *In re Gillman's Estate*, 11 R. 10 Eq. 92.

Whether a grant of an annuity without words of limitation charged upon a chattel interest would endure beyond the life of the annuitant, if he dies during the term, is doubtful. *Cases supra*.

In the case of wills the gift of an annuity or annual sum to A. or A. for life and then to B., or to several persons

Annuity  
created *de  
novo* is for  
life.

Rule as to  
annuity given  
by will.

successively for life and then to their children or to a person or his descendants, gives the beneficiaries in each case interests for their lives only. *Blewitt v. Roberts*, 10 Sim. 491; Cr. & Ph. 274; *Yates v. Maden*, 3 Mac. & G. 582; *Lett v. Randall*, 2 D. F. & J. 388; *Blight v. Hartnoll*, 19 Ch. D. 294; *In re Morgan*; *Morgan v. Morgan*, (1893) 3 Ch. 222. *Bent v. Cullen*, 6 Ch. 235; *Evans v. Walker*, 3 Ch. D. 211, must be considered overruled.

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Thus the fact that the annuity is charged upon freehold property, or even that it exhausts the whole of the rents and profits of the freehold property, and that the testator shows upon the face of his will that he is aware of this, will not make the annuity perpetual. *Mansergh v. Campbell*, 3 De G. & J. 232; *Barden v. Meagher*, I. R. 1 Eq. 246; *Sulliran v. Galbraith*, I. R. 4 Eq. 582; *Whitten v. Hanlon*, 16 L. R. Ir. 298; *Blight v. Hartnoll*, 19 Ch. D. 294.

Charge upon  
rents of free-  
holds.

Similarly the fact that the annuity is charged upon a fund or given out of the income of a fund or that a fund is given upon trust to pay the annuity does not make the annuity perpetual. *Wilson v. Maddison*, 2 Y. & C. C. 372; *In re Foster's Estate*, 23 L. R. Ir. 269; *In re Morgan*; *Morgan v. Morgan*, (1893) 3 Ch. 222.

Charge upon  
income of a  
fund.

b. But if the annuity is given in such a way as to amount to a gift of the income of a particular fund without limit of time, or as a gift of so much capital as will produce the annual sum, or if the whole estate is distributed in the shape of annual sums, the annuity or annual sums will be perpetual. *Rawlings v. Jennings*, 13 Ves. 39; *Stokes v. Heron*, 12 Cl. & F. 161; *Kerr v. Middlesex Hospital*, 2 D. M. & G. 576; *Hill v. Rattey*, 2 J. & H. 634; *Potter v. Baker*, 13 B. 273; 15 B. 489; *Hicks v. Ross*, 14 Eq. 141; *Engelhardt v. Engelhardt*, 26 W. R. 853; see *Wakeham v. Merrick*, 37 L. J. Ch. 45.

When annuity  
is perpetual.

And if the annuity is charged upon income which itself continues only for a limited time, for instance, upon the rents of a leasehold property, slight indications of intention are sufficient to show that it was to last during the currency of the lease. *Courtenay v. Callagher*, 5 Ir. Ch. 154, 356.

Charge upon  
leaseholds.

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Direction to  
invest to  
provide  
annuity.

A direction to invest a sum in Government securities sufficient to produce a certain annual sum for a beneficiary (a), or to invest sufficient to answer the following annuities (b), gives only life annuities. *Re Grove's Trusts*, 1 Giff. 74 (a); *Re Taber*; *Arnold v. Kayess*, 46 L. T. 805; 30 W. R. 883; 51 L. J. Ch. 721 (b); see *Banks v. Braithwaite*, 11 W. R. 398; 32 L. J. Ch. 35, 198.

Direction to  
purchase  
annuity.

There can be no doubt that a direction to purchase an annuity of so much a year for A. is a direction to purchase a life annuity only; but in some cases a direction to purchase such an annuity in "the British funds," or "in Government securities," has been held a gift of so much Consols as would produce the annual sum. *Kerr v. Middlesex Hospital*, 2 D. M. & G. 576; *Ross v. Borer*, 2 J. & H. 469.

Direction for  
cessor or sale  
at a certain  
time.

If the annuity is directed to cease if the legatee dies without issue, or is directed not to be sold till after the death of the legatee, there is a strong argument that it was meant to be perpetual. *Hedges v. Harpur*, 3 De G. & J. 129; *Pawson v. Pawson*, 19 B. 146.

Powers of  
appointing  
the annuity  
in fee.

Or again, if the legatee has a power of appointing the annuity in words that would authorise the appointment of a perpetual annuity, or the annuity is given over in certain events in fee, the same argument arises. *Wright v. Wright*, 12 Ir. Ch. 401; *Robinson v. Hunt*, 4 B. 450.

Limitations  
inconsistent  
with a mere  
life interest.

And if the annuity, being given to several persons as tenants in common, is given over in its entirety at a period when, if it were only for the life of the legatees, it might have partially determined, it will be perpetual, as it would be absurd to suppose that it is to cease upon the death of a prior annuitant and to revive again in certain events. *Mansergh v. Campbell*, 3 De G. & J. 237; *Barden v. Meagher*, 1. R. 1 Eq. 246.

2. Annuities given for a period and for an object :

Annuity  
given for  
fixed period  
for main-  
tenance does  
not determine  
with minority.

An annuity given to a person for a fixed period for maintenance is not determined by the attainment of majority, or by death before that period. *Savery v. Dyer* Amb. 139; *Badham v. Mee*, 1 R. & M. 631; *Longmore v. Elcum*, 2 Y. & C. C. 363; *Lewes v. Lewes*, 16 Sim. 266; *Attwood v. Alford*, L. R. 2 Eq.

479; *In re Ord*; *Dickinson v. Dickinson*, 9 Ch. D. 667; 12 Ch. D. 22.

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This, however, does not apply where the duration of the annuity is merely the duration of the legal estate; if, for instance, the annuity is given to trustees for their lives, and the life of the longest liver of them, for the support of A. *Ryan v. Keogh*, I. R. 4 Eq. 357.

The gift of an annual sum for maintenance and education is not to be limited to minority, but creates a life interest. *Soames v. Martin*, 10 Sim. 287; *Wilkins v. Jodrell*, 13 Ch. D. 564; see *Frewen v. Hamilton*, 47 L. J. Ch. 391; *In re Booth*; *Booth v. Booth*, (1894) 2 Ch. 282; see p. 413, *ante*.

Annuity for  
maintenance  
and educa-  
tion.

In *Gardner v. Barker*, 18 Jur. 508, an annuity for maintenance and education was limited to minority. See *Foley v. Parry*, 2 M. & K. 138.

A gift of an annuity to a trustee, so long as he should continue to execute the office of trustee under the will, or for his trouble, ceases with the active trusts, not necessarily with a judgment for administration. *Baker v. Martin*, 8 Sim. 25; *Hull v. Christian*, 17 Eq. 546; *M'Dermot v. O'Connor*, I. R. 10 Eq. 352; *Clay v. Coles*, W. N. 1880, 145; *Henrion v. Bonham*, Dru. t. Sug. 476; see *In re Muffett*; *Jones v. Mason*, 56 L. J. Ch. 600; 56 L. T. 685.

Annuity to  
trustee for his  
trouble.

It is clear that a gift of rents and profits to a parent during the minority of a child, where no benefit is intended for the child, will go to the representatives of the parent if he dies during the minority. *Smith v. Havens*, Cro. Eliz. 252; *Laxton v. Eedle*, 19 B. 321.

Gift to a  
person during  
the minority  
of an infant.

On the other hand, if the child dies during his minority the parent will, nevertheless, be entitled to the rents and profits till the time when the child, if living, would have attained twenty-one, if the object of the gift is payment of debts. *Carter v. Church*, 1 Ch. Ca. 113; *Boraston's Case*, 3 Rep. 19a.

And it would seem that the construction would be the same if the object of the term is the benefit of the person to whom the rents and profits are given during the minority. *Coates v. Needham*, 2 Vern. 65. See 1 Jarm. 544.

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On the other hand, if the term is created for the benefit of the child, or if the object of it is merely to postpone the interest of the child till he should have performed some condition, which could not be performed after his death, the term will determine with his life. See *Manfield v. Dugard*, 1 Eq. Abr. 194, pl. 4, where the report is very unsatisfactory; *Lomax v. Holmeden*, 3 P. W. 176; and see *Castle v. Eate*, 7 B. 296; *Goodright d. Revell v. Parker*, 1 M. & S. 692.

### III. ANNUITIES CHARGED ON CORPUS OR INCOME.

Whether annuities are payable out of income or corpus.  
Express charge on corpus.

It is often a question of some difficulty whether an annuity is payable out of the corpus or only out of the income of a fund set aside for its payment.

1. If the annuity is plainly charged upon the corpus, the corpus is of course liable to make good arrears. *Picard v. Mitchell*, 14 B. 103; *Howarth v. Rothwell*, 30 B. 516; *Stamper v. Pickering*, 9 Sim. 176; *Wroughton v. Colquhoun*, 1 De G. & S. 36, 357; *Hickman v. Upsall*, 2 Giff. 124; *Gordon v. Bowden*, 6 Mad. 342; *Swallow v. Swallow*, 1 B. 492, n.; *Torre v. Browne*, 5 H. L. 555; *Haynes v. Haynes*, 3 D. M. & G. 590; *Lazonby v. Rawson*, 4 D. M. & G. 556; *Upton v. Vanner*, 1 Dr. & Sm. 594; *Horton v. Hall*, 17 Eq. 437; *Pearson v. Helliwell*, 18 Eq. 411; *In re Tucker*; *Tucker v. Tucker*, (1893) 2 Ch. 323; *Re Webb*; *Leedham v. Patchett*, 63 L. T. 545.

Direction to set apart a fund which is to fall into the residue.

2. And if there is a clear gift of an annuity, a direction to set a fund apart to secure it which is to fall into the residue upon the death of the annuitant, does not disentitle the annuitant to have arrears made up out of corpus, since the direction is merely a means to the end. The question is then merely between the annuitant and the residuary legatee. *Bright v. Larcher*, 3 De G. & J. 148; *Davies v. Wattier*, 1 S. & St. 463; *May v. Bennett*, 1 Russ. 370; *Miner v. Baldwin*, 1 Sm. & G. 522; *Wright v. Callender*, 2 D. M. & G. 652; *Croly v. Weld*, 3 D. M. & G. 993; *Ingleman v. Worthington*, 1 Jur. N. S. 1062; *Mills v. Drewitt*, 20 B. 632; *Perkins v. Cooke*, 2 J. & H. 393; *Anderson v. Anderson*, 33 B. 223; *Magill v. Murphy*, 1 L. R. Ir. 196; *Carmichael v. Gee*, 5 App. C. 588; *Re Taylor*; *Illsley v. Randall*, 50 L. T. 717.

It makes no difference that the fund if directed to fall into the residue after the death of the annuitant may go to persons other than the residuary legatees. *Wright v. Callender, supra.*

In these cases, the direction to set apart a fund in fact amounts to a charge upon the corpus.

3. But if there is a direction to set apart a sum of money in order to pay an annuity out of the dividend with a gift over, the annuitant is not entitled to come upon the corpus, and it is a simple case of tenant for life and remainderman. *A.-G. v. Poulden*, 3 Ha. 555; *Baker v. Baker*, 6 H. L. 616; *Hindle v. Taylor*, 20 B. 109; *Miller v. Huddleston*, 17 Sim. 71; 3 Mac. & G. 513; *Tarbottom v. Earle*, 11 W. R. 686; *Michell v. Wilton*, 23 W. R. 789.

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Direction  
to set apart  
a fund to  
pay an  
annuity out of  
the dividends  
with gift over.

4. When, however, the annuity is charged upon the income of the whole estate there is more difficulty. If the capital is given over "subject to" or "after payment" of the annuities the corpus is liable. *Phillips v. Gutteridge*, 11 W. R. 12; 8 Jur. N. S. 1196; 32 L. J. Ch. 1; 3 D. J. & S. 332; *Stamper v. Pickering*, 9 Sim. 176; *Playfair v. Cooper*, 17 B. 187; *Ex parte Wilkinson*, 3 De G. & S. 633; *Perkins v. Cooke*, 2 J. & H. 393; *Re Tyndall*, 7 Ir. Ch. 181; *Percy v. Percy*, 35 B. 295; *Bell v. Bell*, 1 R. 6 Eq. 239; *Birch v. Sherratt*, 4 Eq. 58; 2 Ch. 644; *In re Mason*; *Mason v. Robinson*, 8 Ch. D. 411; *In re Pepper's Trusts*, 13 L. R. Ir. 108; *In re Moore's Estate*, 19 L. R. Ir. 365.

Annuity  
charged upon  
income of  
whole estate.

In marriage settlements the nature of the document assists the construction, and a jointure to the wife out of rents and profits has in several cases been held to be a charge upon corpus, especially where the husband became entitled to the estate after payment of the jointure. *Tyndall's Estate*, 7 Ir. Ch. 181; *Carter v. Salt*, 1 R. 1 Eq. 97; *In re West's Estate*, (1898) 1 Ch. 75.

Marriage  
settlements.

5. But if there is anything to show that the corpus is looked upon as entire after the annuitant's death; if, for instance, it is given over immediately upon the death of the annuitant, or the trust then comes to an end, or it is then directed to be sold, or if the corpus is devised in strict settlement, it is not liable to make good arrears. *Foster v. Smith*, 1 Ph. 629;

Corpus  
treated as  
remaining  
entire at the  
annuitant's  
death.

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*Addecott v. Addecott*, 29 B. 460; *Re Kelly*, 9 Ir. Ch. 108; *Forbes v. Richardson*, 11 Ha. 354; *Darbon v. Rickards*, 14 Sim. 537; *Earle v. Bellingham* (No. 1), 24 B. 445; *Sheppard v. Sheppard*, 32 B. 194; *Taylor v. Taylor*, 17 Eq. 324.

Gift of  
surplus  
income of  
each year.

And if it is clear that the annuity is to be paid only out of the income of each year, by a gift, for instance, of the surplus income of each year as it accrues to others, the corpus is *a fortiori* not liable. *Stelfox v. Sugden*, John. 234; *Darbon v. Rickards*, 14 Sim. 537; *Sheppard v. Sheppard*, 32 B. 194; *Wormald v. Muzeen*, 17 Ch. D. 167; revd. 29 W. R. 795; *In re Matthews' Estate*, 7 L. R. Ir. 269.

When an  
annuity is a  
continuing  
charge on the  
annual rents.

6. In some cases the further question arises whether, supposing the annuity not to be charged upon corpus, it is a continuing charge on the rents and profits, so that arrears will have to be made up out of surplus income during the annuitant's life, and even after his death, and if there is nothing to show that the annuity was to be confined to the income of each year, as in *Stelfox v. Sugden* and *Wormald v. Muzeen*, or that it was to determine immediately on the annuitant's death, as in *Foster v. Smith*, 1 Ph. 629; *Earle v. Bellingham*, 24 B. 445, arrears will be a continuing charge during the annuitant's life and after his death. *Forbes v. Richardson*, 11 Ha. 354; *Phillips v. Phillips*, 8 B. 193; *Taylor v. Taylor*, 17 Eq. 324; *Booth v. Coulton*, 5 Ch. 684; *Salvin v. Weston*, 14 W. R. 757.

#### IV. STATUTES OF LIMITATION.

Rent-charge  
and annuity  
charged on  
realty and  
personalty.

Only six years' arrears of an annuity charged on real estate or on real and personal estate can be recovered, and the annuity itself is barred by non-payment for twelve years; 3 & 4 Will. IV. c. 27, ss. 2, 42; 37 & 38 Vict. c. 57, ss. 1, 9. *James v. Salter*, 3 Bing. N. C. 544; *Francis v. Grover*, 5 Ha. 39; *Irish Land Commission v. Grant*, 10 App. C. 14; *Dower v. Dower*, 15 L. R. Ir. 264; *In re Nugent's Trusts*, 19 L. R. Ir. 140.

Express trust.

It would seem that since 37 & 38 Vict. c. 57, s. 10, an express trust to pay the annuity would make no difference.



That section provides that no action shall be brought to recover any sum of money or legacy charged upon land and secured by an express trust except within the time within which the same would be recoverable if there were no trust. However, in *Hughes v. Coles*, 27 Ch. D. 231, it was held that, though after twelve years the right to all arrears was barred, future payments of the annuity were not affected.

An annuity charged on personalty is a legacy within sect. 40 of 3 & 4 Will. IV. c. 27. It is not within sect. 42 of that Act. But whether the effect of sect. 40 is to bar the annuity altogether after the lapse of twelve years, or only to bar each accruing payment, has not yet been decided. *Re Ashwell's Trust*, Jo. 112; *Roch v. Callen*, 6 Ha. 531.

## CHAPTER XXXIV.

## TENANT FOR LIFE AND REMAINDERMAN.

## I. CREATION OF LIFE ESTATES.

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XXXIV.Devise  
without  
words of  
limitation.

1. IN wills before the Wills Act a devise to a person without words of limitation gave a life estate only, but now by section 28 of the Wills Act such a devise is to be construed to pass the fee simple or other the whole interest which the testator had power to dispose of by will, unless a contrary intention appears by the will.

Successive  
life estates  
not enlarged.

If a life interest is devised to A., followed by a devise to his first and other sons successively for life, with remainder to the first and other sons of such first son for ever, the life interest to the first and other sons of A. is not enlarged. *Kershaw v. Kershaw*, 8 E. & B. 845; *Forsbrook v. Forsbrook*, 8 Ch. 98.

And the same construction may be adopted where the interests of the sons of A. are not expressly stated to be for life.

Thus, under a devise to A. for life with remainder to his first and every other son successively, not expressly for life, and in default of such issue over, each son takes only for life. *Foster v. Lord Romney*, 11 East, 594; *Beran v. White*, 7 Ir. Eq. 473; *Palmer v. Palmer*, 18 L. R. Ir. 192.

Effect of  
gift at the  
death of first  
taker

2. A gift without words of limitation may be cut down to a life interest if the same property is disposed of at the death of the first taker. *In re Russell*, 53 L. J. Ch. 400; revd. 52 L. T. 559; *In re Houghton*; *Houghton v. Houghton*, 53 L. J. Ch. 1018; see *In re Percy*; *Percy v. Percy*, 24 Ch. D. 616.

And words indicating that the property is to be enjoyed

by some one else after the death of the first taker may have the same effect. *Gravenor v. Watkins*, L. R. 6 C. P. 500.

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Similarly where the testator's whole property is given to a person absolutely, followed by a gift of the residue at his decease, the first gift may be cut down to a life interest. *Sherratt v. Bentley*, 2 M. & K. 149; *Hare v. Westropp*, 9 W. R. 689; *Re Brook's Will*, 2 Dr. & Sm. 362; *In re Bagshaw's Trusts*, 24 W. R. 875; 25 W. R. 659; 46 L. J. Ch. 567.

If what is given at the death of the legatee is what then remains, or the then balance or the like, the question is, does the testator intend to leave the absolute gift and to give over only what the absolute owner does not dispose of, in which case the absolute gift remains and the gift over is void (*Perry v. Merritt*, 18 Eq. 152; *Lloyd v. Tweedy*, (1898) 1 Ir. 5; *In re Jones*; *Richards v. Jones*, (1898) 1 Ch. 498); or does he intend to cut down the absolute gift to a life interest.

Gift of  
what remains.

If the true construction is that what in the first instance appeared to be an absolute interest is cut down to a life interest, then the use of such expressions as "whatever remains" will not prevent the intention from taking effect, and the legatee will take either for life simply or for life with a power of disposition, if there is anything in the will to support that construction. When an absolute interest is varied by a codicil it is more easy to construe the variation as intended to give a life interest only. *Constable v. Bull*, 3 De G. & S. 411; *Re Adams' Trusts*, 14 W. R. 18; *Bibbens v. Potter*, 10 Ch. D. 753; *Re Sheldon & Kemble*, 53 L. T. 527; *In re Pounder*; *Williams v. Pounder*, 56 L. J. Ch. 113; 56 L. T. 104; *In re Holden*; *Holden v. Smith*, 57 L. J. Ch. 648; 59 L. T. 258.

A devise to A. for his life and the life of his heir gives him an estate during his own life and that of his heir. *In re Amos*; *Carrier v. Price*, (1891) 3 Ch. 159.

Devise to A.  
for his life  
and that of  
his heir.

## II. GIFTS TO SEVERAL FOR THEIR LIVES.

1. A devise to A. and B. for their lives is equivalent to a devise to them and the survivor of them.

Devise to  
A. and B.  
for their lives.

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So a devise to A. during the life of B. and C. continues during the joint lives of B. and C., and the life of the survivor of them.

But a devise to A. for a term if B. and C. so long live determines by the death of B. or C. *Brudnell's Case*, 5 Rep. 9; *Day v. Day*, Kay, 703.

In the same way a gift of an annuity to two persons for their lives is a gift to them and to the survivor of them, though the annuitants may be husband and wife. *Moffat v. Burnie*, 18 B. 211; *Neighbour v. Thurlow*, 28 B. 33; *Alder v. Lawless*, 32 B. 72; see *Day v. Day*, Kay, 703.

And the same construction has been put upon a gift to two during their joint lives followed by a gift over after the death of both. *Townley v. Bolton*, 1 M. & K. 148; see *Smith v. Oakes*, 14 Sim. 122.

Gift of  
annuity for  
lives of A.  
and B.

2. A direction to purchase an annuity for the lives of A. and B. to be equally divided between them gives them an annuity only during the joint lives. *Grant v. Wimbolt*, 2 W. R. 151; 23 L. J. Ch. 282; *In re Drakeley's Estate* 19 B. 395.

But a gift to A. and B. of the sum of 30*l.* each yearly, so long as they shall live, gives each a separate annuity of 30*l.* *Lill v. Lill*, 23 B. 446.

And a gift of income to three for their respective lives, and subject thereto for their respective children, is a gift of a third to each for his life. *Sutcliffe v. Howard*, 38 L. J. Ch. 472.

Gift of  
income to  
two as tenants  
in common  
for a definite  
period.

3. Under a gift of an annuity to A. and B. as tenants in common during their joint lives and the life of the survivor, if A. dies his legal personal representatives are entitled to half the annuity during the life of the survivor. *Jones v. Randall*, 1 J. & W. 100; *Eales v. Cardigan*, 9 Sim. 384; *Bryan v. Twigg*, 3 Eq. 493; 3 Ch. 183; *Chatfield v. Berchtoldt*, 18 W. R. 387.

If the annuity is to be paid to several as tenants in common but not limited for their lives, and the duration of the annuity is defined by a gift over at the death of the survivor, the same result follows, and the representatives of

a deceased annuitant take his share while the annuity lasts. *Bignold v. Giles*, 4 Dr. 343.

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4. But even in cases where the duration of the annuity is clearly defined there may be words to show that the survivor was to take the whole. Thus, if the gift is to several as tenants in common "for their lives or the life of the survivor for their or her absolute use," or "for their lives and the life of the survivor during their and her natural life," the additional words show that the survivor was to take the whole. *Hatton v. Finch*, 4 B. 186; *Cranswick v. Pearson*, 31 B. 624; affd. 9 L. T. 275; and in *Doe d. Borwell v. Abey*, 1 M. & S. 428, the gift over "from and after their respective deceases and the decease of the survivor" indicated that the representatives of annuitants were not to take anything after their respective deaths.

Cases in which the survivor takes the whole income.

5. If the annuity is given to several for their lives as tenants in common with a gift over of the annuity as a whole after the death of the survivor, the effect may be to give the whole annuity to the survivor during his life, as the limitation for life shows that the representatives of a deceased annuitant were not intended to take after his death.

Duration of annuity inferred from gift over.

Thus, under a gift of an annuity to A. and B. to be equally divided between them for their lives with a gift over after the death of both, or after the death of the survivor, the survivor takes the whole for life. *Armstrong v. Eldridge*, 3 B. C. C. 215; *Tuckerman v. Jefferies*, 3 Bac. Ab. ed. Gw. 681; 11 Mod. 108; *McDermott v. Wallace*, 5 B. 142; *Draycott v. Wood*, 8 L. T. 304.

This construction has been applied to the case of a gift of the income of a fund to A. and B. during their lives in equal shares, followed by a gift after the death of A. and B. to their children, in cases where there was no gift to the children till after the death of the survivor of A. and B. *Armstrong v. Eldridge*, 3 B. C. C. 215; *Pearce v. Edmeades*, 3 Y. & C. Ex. 246; *Alt v. Gregory*, 8 D. M. & G. 221; *Begley v. Cook*, 3 Dr. 662; *Minton v. Minton*, 9 W. R. 586; *Re Buller*; *Buller v. Giberne*, 74 L. T. 406; see *Round v. Pickett*, 47 L. J. Ch. 691; *Kelsey v. Ellis*, 38 L. T. 471.

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### III. PROVISIONS DETERMINING LIFE INTERESTS.

Direction not  
to alienate.

A direction that a life interest is not to be alienated, if there is no provision to determine or give over the life interest, is ineffectual. *Brandon v. Robinson*, 18 Ves. 429; *Graves v. Dolphin*, 1 Sim. 66; *Rochford v. Hackman*, 9 Ha. 475, 480.

Proviso for  
cesser.

But a proviso for cesser of a life interest upon bankruptcy or alienation, whether followed by a gift over or not, and though the life interest is limited to the tenant for life and his assigns, is valid. *Dommett v. Bedford*, 6 T. R. 684; *Joel v. Mills*, 3 K. & J. 458; *Craven v. Brady*, 4 Ch. 296; *Re Kelly's Settlement*; *West v. Turner*, 59 L. T. 494.

Gift over on  
bankruptcy.

And a life interest may be given over upon bankruptcy or alienation. *Rochford v. Hackman*, 9 Ha. 475; *Brooke v. Pearson*, 5 Jur. N. S. 781; *Knight v. Browne*, 7 Jur. N. S. 894; 30 L. J. Ch. 649; *Hurst v. Hurst*, 21 Ch. D. 278.

A direction that the receipt of an annuitant is to be the only discharge the executor is bound to accept, and that he may require the attendance of the annuitant to receive the annuity, does not prevent alienation. *Arden v. Goodacre*, 11 C. B. 883.

A gift over upon the bankruptcy of the tenant for life does not determine a power vested in him of appointing the property to his children, unless there are directions inconsistent with the continuance of the power, such as a direction to distribute the property at once among the children in the event of bankruptcy. *Wickham v. Wing*, 2 H. & M. 436; *Haswell v. Haswell*, 28 B. 26; 2 D. F. & J. 456; *Re Kelly's Settlement*; *West v. Turner*, 59 L. T. 494; see *Potts v. Britton*, 11 Eq. 433; *In re Stone's Estate*, 1 I. R. 3 Eq. 621.

### IV. WASTE.

Various restrictions may be imposed on a life estate.

It may be with or without impeachment of waste, and in the case of a married woman it may be for her separate use with or without power of anticipation during the coverture.

Separate use and restraint upon anticipation apply to absolute as well as to life interests, and will be found dealt with in the Chapter on Conditions.

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A. CREATION OF ESTATES WITH AND WITHOUT IMPEACHMENT OF WASTE.

A tenant for life cannot commit waste, unless expressly made unimpeachable for waste.

A tenant for life without impeachment of waste, voluntary waste excepted, is only excused for permissive waste. *Garth v. Cotton*, 1 Ves. Sen. 524, 546; 1 Dick. 183.

Impeachment  
of waste.

But the exception of voluntary waste may be so qualified as to entitle the tenant for life to cut timber. *Vincent v. Spicer*, 22 B. 380; see *Wickham v. Wickham*, 19 Ves. 419.

Tenant for life unimpeachable for waste may in effect be deprived of the right to cut timber if a large discretion to cut timber is vested in trustees. *Kekewich v. Marker*, 3 Mac. & G. 311.

Tenants in dower and by curtesy are impeachable for waste. *Ap Rice's Case*, 3 Leon. 121; Co. Litt. 53a.

Tenants in  
dower and  
by curtesy.

Tenant in fee subject to an executory devise over may commit legal but not equitable waste. *Turner v. Wright*, Jo. 742; 2 D. F. & J. 234.

Tenant in  
fee subject  
to gift over.

He may be restrained from cutting timber by express words. *Blake v. Peters*, 1 D. J. & S. 345.

Tenant in tail after possibility of issue extinct is in the position of tenant for life dispunishable for waste. *Lewis Bowles' Case*, 11 Rep. 79b; *Williams v. Williams*, 15 Ves. 419; 12 East, 209.

Tenant in  
tail after  
possibility of  
issue extinct.

Tenant in tail restrained by statute from disentailing is dispunishable for legal waste, but will be restrained from equitable waste. *A.-G. v. Duke of Marlborough*, 3 Mad. 498.

Tenant in  
tail by Act of  
Parliament.

B. RIGHTS AS REGARDS TIMBER, &c.

1. *Tenant for Life without Impeachment of Waste.*

Tenant for life without impeachment of waste may commit legal but not equitable waste.

Legal and  
equitable  
waste.

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Thus, he may cut down the timber on the estate, not being ornamental timber, and it becomes his property from the moment of severance. *Wolf v. Hill*, 2 Sw. 149, n.; *Doran v. Wiltshire*, 3 Sw. 699; *Gordon v. Woodford*, 27 B. 608.

He may cut trees which have become timber though they have not attained maturity, or though cutting them will deprive saplings of shelter. *Smythe v. Smythe*, 2 Sw. 252; *Potts v. Potts*, 3 L. J. Ch. O. S. 176.

But though he is entitled to the timber when cut down, he is not entitled to it till then, and if he has a power of sale he cannot sell and appropriate the value of the timber. *Wolf v. Hill*, 2 Sw. 149, n.; *Doran v. Wiltshire*, 3 Sw. 699.

Windfalls.

Timber and the materials of houses blown down during the possession of a tenant for life without impeachment of waste belong to him. *Lewis Bowles' Case*, 11 Rep. 79b; Tudor, L. C. 86; *Pyne v. Dor*, 1 T. R. 55; *Wolf v. Hill*, 2 Sw. 149, n.; *Williams v. Williams*, 15 Ves. 419; 12 East, 209.

Unripe  
timber.

But tenant for life without impeachment of waste may not cut young trees and saplings before they are fit for timber. *O'Brien v. O'Brien*, Amb. 106; *Strathmore v. Bowes*, 2 B. C. C. 88; *Chamberlayne v. Dummer*, 1 B. C. C. 166; 3 B. C. C. 548; see *Aston v. Aston*, 1 Ves. Sen. 264; *Potts v. Potts*, 3 L. J. Ch. O. S. 176.

Wanton  
destruction.

The Court will in all cases restrain wanton destruction, such as cutting down fruit trees, or pulling down a mansion-house or buildings. *Vane v. Lord Barnard*, 2 Vern. 738; Pr. Ch. 454; Gilb. Eq. 127; *Anon.*, 2 Eq. Ab. 757, pl. 2; *Kaye v. Banks*, 2 Dick. 481; *Aston v. Aston*, 1 Ves. Sen. 264.

But if the tenant for life pulls down a mansion-house, and rebuilds it with the same materials, there can be no account against him. *Morris v. Morris*, 3 De G. & J. 323.

Equitable  
waste.

By sect. 25 (3) of the Judicature Act, 1873, tenant for life without impeachment has no legal right to commit equitable waste.

Equitable waste is cutting down ornamental timber.

What is  
ornamental  
timber.

Ornamental timber includes trees growing naturally which are, in fact, ornamental, and trees planted for ornament, whether in fact ornamental or not, even though planted by



the tenant for life himself. *Packington's Case*, 3 Atk. 216; *Coffin v. Coffin*, Jac. 70; see *Ford v. Tynte*, 2 D. J. & S. 127.

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Where a mansion-house has been pulled down, and the estate devoted to game, the timber, though formerly ornamental, will not be protected. *Micklethwait v. Micklethwait*, 1 De G. & J. 504.

Effect of  
pulling down  
mansion-  
house.

But in such a case the ornamental timber may be protected if the estate is intended to be let on building leases. *Wellesley v. Wellesley*, 6 Sim. 497; *Morris v. Morris*, 15 Sim. 505.

And where the tenant for life restores a decayed mansion-house, he may cut down ornamental timber about it. *Newdigate v. Newdigate*, 1 Sim. 131; 2 Cl. & F. 601; 8 Bli. N. S. 734.

A tenant for life unimpeachable for waste who cuts down ornamental timber which the Court would have directed to be cut if application had been made to it was held entitled to the proceeds. *Baker v. Sebright*, 13 Ch. D. 179.

## 2. Tenant for Life Impeachable for Waste.

Tenant for life impeachable for waste has a general property in trees not timber; he may cut them down and take the proceeds, and if blown down by a storm or severed by a stranger they belong to him. *Countess of Cumberland's Case*, Moor. 812; *Channon v. Patch*, 5 B. & C. 897; *Berriman v. Peacock*, 8 Bing. 384; *Bateman v. Hotchkin*, 31 B. 486; *Pidgely v. Rawling*, 2 Coll. 275; *Earl Cowley v. Wellesley*, 35 B. 635; L. R. 1 Eq. 656; *Honywood v. Honwood*, 18 Eq. 306, 307.

Rights of  
tenant for life  
impeachable  
for waste as  
regards trees  
not timber.

He may cut timber for repairs actually about to be done, but he may not sell the timber in order to spend the money in repairs, and if the timber proves unsuitable for the repairs, he may not sell it and take the proceeds. *Malverer v. Spinke*, Dyer, 35b; *Gower v. Eyre*, G. Coop. 156; *Simmons v. Norton*, 7 Bing. 640.

Timber for  
repairs.

But he may sell the timber cut in order to buy other timber in a more convenient situation. *Wither v. Dean & Chapter of Winchester*, 3 Mer. 421, 426; *Sowerby v. Fryer*, 8 Eq. 417.

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Timber for  
fences.  
Periodical  
cuttings.

He may not cut timber to inclose lands allotted or exchanged under Inclosure Acts. *Lee v. Alston*, 1 B. C. C. 194.

Tenant for life impeachable for waste is entitled to the periodical cuttings of coppices and plantations of timberlike trees which have never been allowed to grow into timber but have always been cut as underwood. *Bateman v. Hotchkin*, 31 B. 486; *Bagot v. Bagot*, 32 B. 509, 517.

Timber  
estates.

In the case of an estate in a district in which it is the custom to cut timber periodically when grown in woods, so as to continue a succession of timber and to preserve the woods, the tenant for life is entitled to the proceeds of the periodical cuttings. *Dashwood v. Magniac*, (1891) 3 Ch. 306; see *Oxenden v. Compton*, 2 Ves. Jun. 69, p. 71.

Settlement  
on trust  
for sale.

Where an estate was settled upon trust for sale and to pay the income of the proceeds of sale to a tenant for life, and larch plantations on the estate were blown down by a storm, it was held that the proceeds must be invested, but the tenant for life was held entitled to have his income made up out of the investments to the sum he had received on an average of years. *In re Harrison's Trusts*; *Harrison v. Harrison*, 28 Ch. D. 220.

### 3. Property in Timber Cut, &c.

Property  
in proceeds  
of legal  
waste.

In the case of legal waste, timber wrongfully cut, whether by tenant for life or a stranger, or its proceeds vest in the first owner of a vested estate of inheritance, whether there are intermediate life estates unimpeachable for waste, or intermediate contingent remainders or not. *Whitfield v. Bewit*, 2 P. W. 240; *Lee v. Alston*, 3 B. C. C. 38; 1 Ves. Jun. 82; *Bewick v. Whitfield*, 3 P. W. 267; *Gent v. Harrison*, Joh. 517; *Dare v. Hopkins*, 2 Cox, 110; *Pigott v. Bullock*, 1 Ves. Jun. 478.

Statute of  
Limitations.

The owner of the first estate of inheritance can immediately sue to recover the timber or its proceeds, and the Statute of Limitations runs against him from the date of the cutting. *Seagram v. Knight*, L. R. 2 Ch. 628; *Higginbotham v. Hawkins*, 7 Ch. 676.

Timber  
blown down.

Timber blown down by a storm during the possession of a tenant for life impeachable for waste follows the same rule,

that is to say, it belongs to the owner of the first vested estate of inheritance, and is not invested. *Uvedall v. Uvedall*, 2 Roll. Ab. 119; *Pigott v. Bullock*, 1 Ves. Jun. 484; *Lewis Bowles' Case*, 11 Rep. 79b; *Tudor*, L. C. 86; *Whitfield v. Bewit*, 2 P. W. 240; *Bewick v. Whitfield*, 3 P. W. 267; *Duke of Newcastle v. Vane*, cited 2 P. W. 241.

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If the person having a vested estate of inheritance commits the waste, or if the tenant for life and remainderman in fee collude to commit waste, equity will interfere at the instance of an intermediate tenant for life, or of trustees to preserve contingent remainders, and will preserve the proceeds of the waste for the benefit of persons who become entitled under subsequent intermediate limitations. *Williams v. Duke of Bolton*, 1 Cox, 72; 3 P. W. 261, n.; *Powlett v. Duchess of Bolton*, 3 Ves. 374; *Garth v. Cotton*, 1 Ves. Sen. 524; 1 Dick. 183; *Perrot v. Perrot*, 3 Atk. 94; *Davies v. Leo*, 6 Ves. 784; *Birch-Wolfe v. Birch*, 9 Eq. 683.

Collusion  
between  
tenant for  
life and  
remainderman.

In such a case, however, if as much is laid out upon the estate as is taken from it by waste, equity will not interfere. *Birch-Wolfe v. Birch*, 9 Eq. 683.

The law appears to be unsettled as to the property in the proceeds of equitable waste.

Proceeds of  
equitable  
waste.

There is authority for saying that they follow the analogy of legal waste and vest in the owner of the first estate of inheritance in existence at the time when the waste is committed.

It would follow that a tenant for life in remainder cannot sue for an account of the proceeds, and it has been so held in *Rolt v. Lord Somerville*, 2 Eq. Ab. 759; *Ormond v. Kynnersley*, 7 L. J. Ch. O. S. 150; 8 *ib.* 67; 15 B. 10, n.

It would also follow that the statute runs against the remainderman from the time when the waste was committed. *Simpson v. Simpson*, 3 L. R. Ir. 308.

The better opinion, however, appears to be that the proceeds of equitable waste must be invested and treated as part of the estate. During the life of the tenant for life who committed the waste the proceeds must be invested and the income will be accumulated, but a subsequent tenant for life will take the

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income. This was done in *Lushington v. Boldero*, G. Coop. 216 ; 6 Mad. 149 ; 13 B. 418 ; 15 B. 1 ; see *Honywood v. Honynwood*, 18 Eq. 306.

The same view is also supported by the cases in which tenant for life in remainder has been held entitled to sue for an injunction to restrain equitable waste. *Perrot v. Perrot*, 3 Atk. 94 (apparently a case of legal waste) ; *Davies v. Leo*, 6 Ves. 784, 786 ; *Morris v. Morris*, 15 Sim. 505.

It is also supported by the decision of Lord Cottenham that the statute does not begin to run against the remainderman until his title accrues in possession. *Duke of Leeds v. Earl of Amherst*, 2 Ph. 117 ; see *Harcourt v. White*, 28 B. 303 ; *Birch-Wolfe v. Birch*, 9 Eq. 683.

Power under  
Settled Land  
Act to cut  
timber.

Sect. 35 of the Settled Land Act, 1882, provides that where a tenant for life is impeachable for waste in respect of timber and there is timber ripe and fit for cutting, he may, with the consent of the trustees of the settlement or under an order of the Court, cut the timber. Three-fourths of the proceeds are capital and the rest income.

Timber cut  
by Court.

In cases not within this section, where timber is cut by a trustee or by the Court because it is decaying or to make room for other trees, the proceeds are invested and the interest paid to the tenant for life. *Wickham v. Wickham*, G. Coop. 288 ; 19 Ves. 419 ; *Tooker v. Annesley*, 5 Sim. 235 ; *Waldo v. Waldo*, 7 Sim. 261 ; 12 Sim. 107 ; *Tollemache v. Tollemache*, 1 Ha. 456 ; *Ferrand v. Wilson*, 4 Ha. 381 ; *Lord Lovat v. Duchess of Leeds*, 2 Dr. & Sm. 75 ; *Earl Cowley v. Wellesley*, L. R. 1 Eq. 656 ; *Honywood v. Honynwood*, 18 Eq. 306.

The capital will belong to the first tenant for life without impeachment of waste who comes into possession or to the first owner of an estate of inheritance. *Gent v. Harrison*, Joh. 517 ; *Waldo v. Waldo*, 12 Sim. 107 ; *Phillips v. Barlow*, 14 Sim. 263 ; *Jodrell v. Jodrell*, 7 Eq. 461 ; *Lowndes v. Norton*, 6 Ch. D. 139.

### C. RIGHTS AS REGARDS MINES.

Mines.

Tenant for life impeachable for waste is entitled to the profits of open mines and quarries. It is not necessary that

the mines should have been opened by the settlor or testator himself. He may also open a new pit if it is for the more profitable working of an old mine. *Co. Litt.* 54b; *Spencer v. Scurr*, 31 B. 334; *Bagot v. Bagot*, 32 B. 509; *Earl Cowley v. Wellesley*, 35 B. 635; *Miller v. Miller*, 13 Eq. 263; *In re Maynard's Settled Estate*, (1899) 2 Ch. 347; *Greville-Nugent v. Mackenzie*, (1900) A. C. 273; see *Elias v. Snowden Slate Quarries*, 4 App. C. 454.

He is also entitled to the profits of mines opened under powers conferred by the testator or agreed to be leased by him though the leases are not actually granted or the mines opened at the testator's death. *Daly v. Beckett*, 24 B. 114; *Earl Cowley v. Wellesley*, 35 B. 635; *In re Kemeys-Tynte*; *Kemeys-Tynte v. Kemeys-Tynte*, (1892) 2 Ch. 211.

He cannot work an abandoned mine. *Clavering v. Clavering*, 2 P. W. 388; *Viner v. Vaughan*, 2 B. 466.

The Settled Land Act, 1882, authorises the granting of mining leases by tenants for life, and provides (sect. 11) for the disposal of the rents.

Except in the cases above mentioned, a tenant for life impeachable for waste is not entitled to the profits of mines not opened till after the testator's death. *Campbell v. Wardlaw*, 8 App. C. 641.

Where minerals are got by a trespasser during the lives of successive tenants for life unimpeachable for waste and compensation is paid, the compensation is divisible between the estates of the tenants for life in proportion to the minerals got during each life. *In re Barrington*; *Gamlen v. Lyon*, 33 Ch. D. 523.

Where minerals are taken by a railway company under compulsory powers the proceeds must be invested and the tenant for life unimpeachable for waste receives the income only. *In re Robinson's Settlement*, (1891) 3 Ch. 129; see *In re Barrington*, *supra*.

Compensation  
for minerals  
got by  
trespasser.

Minerals  
taken by  
railway  
company.

#### D. PERMISSIVE WASTE.

1. A tenant for life, whether legal or equitable, of freeholds or leaseholds, is not liable to the remainderman for permissive waste. *Powys v. Blagrave*, 4 D. M. & G. 448; *Warren v.*

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life not liable  
for permissive  
waste.

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*Rudall*, 1 J. & H. 1 ; *Baines v. Dowling*, 44 L. T. 809 ; *In re Hotchkys* ; *Freke v. Calmady*, 32 Ch. D. 408 ; *In re Cartwright* ; *Aris v. Newman*, 41 Ch. D. 532 ; *In re Parry & Hopkin*, (1900) 1 Ch. 160.

2. If the will directs the tenant for life to repair, his estate is liable, upon the implied contract arising from the fact that he takes possession. *Woodhouse v. Walker*, 5 Q. B. D. 404 ; *Re Williamses* ; *Andrew v. Williamses*, 52 L. T. 41 ; 54 L. T. 105 ; *Blackmore v. White*, (1899) 1 Q. B. 293 ; *Dingle v. Coppen*, (1899) 1 Ch. 726.

Measure of  
damages.

The amount recoverable is the sum reasonably necessary to put the premises in the state of repair in which the tenant for life ought to have left them. *Woodhouse v. Walker*, 5 Q. B. D. 404, p. 408 ; *Re Bradbrook*, 56 L. T. 106 ; see *Conquest v. Ebbetts*, (1896) A. C. 490 ; *Joynes v. Weeks*, (1891) 1 Q. B. 31.

A tenant for life bound to keep the property in tenantable condition will not be liable for the depreciation of the land if he deals with it in the same way in which the testator had dealt with it. *Dingle v. Coppen*, *supra*.

Liability to  
insure and  
rebuild.

3. If an obligation is imposed on the tenant for life to repair he is also bound to insure and to rebuild in case of fire. *In re Skingley*, 3 Mac. & G. 221 ; *Gregg v. Coates*, 23 B. 33 ; *Pinfold v. Shillingford*, 46 L. J. Ch. 491 ; 25 W. R. 425.

He is not bound to pay a sum for which the testator was at his death liable for repairs. *Harris v. Poyner*, 1 Dr. 174 ; *Pinfold v. Shillingford*, *supra* ; see *Hickling v. Boyer*, 3 Mac. & G. 635.

But a direction to keep the property in good and tenantable repair may make the tenant for life liable for dilapidations existing at the testator's death. *Re Bradbrook*, 56 L. T. 106.

## V. ORDINARY OUTGOINGS.

Tenant for  
life must  
bear ordinary  
outgoings.

The tenant for life must pay the ordinary outgoings incident to the property of which he is tenant for life, such as rates, taxes, and the like.

Tenant's  
valuation.

If a tenant is entitled at the end of his term to be paid for his property at a valuation, the tenant for life must pay the amount and recover it, if possible, from the incoming tenant. *Mansel v. Norton*, 22 Ch. D. 769.

The tenant for life of leaseholds must, as between himself and the estate, pay the rent and perform the covenants to repair and insure, if any, and the other covenants contained in the lease under which the property is held. He is not liable for repairs necessary at the commencement of his interest, or in respect of breaches of covenant committed before the testator's death. *Marsh v. Wells*, 1 S. & St. 87; *In re Fowler*; *Fowler v. Odell*, 16 Ch. D. 722; *In re Courtier*; *Coles v. Courtier*, 34 Ch. D. 136; *In re Redding*; *Thompson v. Redding*, (1897) 1 Ch. 876; *Brereton v. Day*, (1895) 1 Ir. 519; *Kingham v. Kingham*, (1897) 1 Ir. 170, 174; *In re Betty*; *Betty v. A.-G.*, (1899) 1 Ch. 821; *In re Gjers*; *Cooper v. Gjers*, (1899) 2 Ch. 54; not following *In re Baring*; *Baring v. Baring*, (1893) 1 Ch. 61; *In re Tomlinson*; *Tomlinson v. Tomlinson*, (1898) 2 Ch. 232.

Where a leasehold which the testator had assigned came back to the estate after his death under a compromise with the assignee, it was held that the liabilities under the lease were payable out of corpus. *Allen v. Embleton*, 4 Dr. 226.

The cost of sanitary works which local authorities require to be executed under the powers conferred upon them by the Public Health Acts, where the land is vested in trustees in trust for a tenant for life, has in some cases been charged upon the property (a); in others it has been held payable out of income (b). *In re Barney*; *Harrison v. Barney*, (1894) 3 Ch. 562; *In re Lever*; *Cordwell v. Lever*, (1897) 1 Ch. 32; see *In re Thomas*; *Weatherall v. Thomas*, (1900) 1 Ch. 319 (a); *In re Crawley*; *Acton v. Crawley*, 28 Ch. D. 431; see, too, *Ex parte Davis*, 3 De G. & J. 142 (b).

Repairs executed under similar circumstances have been held payable out of income though the tenant for life was in receipt not of the rack-rent but only of an improved ground rent. *In re Copland's Settlement*; *Johns v. Carden*, (1900) 1 Ch. 326.

As to the meaning of outgoings with reference to the requirements of local authorities, see also *In re Boor*; *Boor v. Hopkins*, 40 Ch. D. 572; *Tubbs v. Wynne*, (1897) 1 Q. B. 74.

## VI. EMBLEMENTS.

Emblements are corn, roots, flax, hemp and other annual profits. Co. Litt. 55; *Latham v. Atwood*, Cro. Car. 515;

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Liability of  
tenant for life  
of leaseholds.

Sanitary  
works.

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Right of  
executor of  
tenant for  
life to  
emblements.

*Erans v. Roberts*, 5 B. & C. 832; see *Graves v. Weld*, 5 B. & Ald. 120.

The executor of a tenant for life whose estate determines by death is entitled to emblements, that is to say, the produce of the soil which is the result of his sowing. *Sir Henry Knivet's Case*, 5 Rep. 85; *Oland's Case*, 5 Rep. 116.

Divorce is an act of law and does not disentitle a husband who holds during coverture. *Oland's Case*, *supra*.

He is not entitled when his estate determines by his own act, as by the marriage of a tenant for life during widowhood. *Oland's Case*, *supra*; Co. Litt. 55b; *Davies v. Eytton*, 4 Moo. & P. 820; 7 Bing. 154.

Nor is he entitled where the crops are not sown by him. *Grantham v. Hawley*, Hob. 135; *Anon.*, Cro. Eliz. 61, 464; *Spencer's Case*, Winch, 51.

#### VII. FIXTURES.

Tenant for  
life cannot  
sever  
fixtures.

Whatever is fixed to the freehold of land becomes part of the freehold or inheritance, and cannot be severed by a tenant for life.

The question as to what are fixtures has rarely arisen between tenant for life and remainderman.

Whatever is strictly and properly part of the architectural design of a house as distinguished from mere ornament to be added afterwards passes with it. Of this kind are tapestry permanently fixed to the walls, pictures in panels, statues, figures, vases and garden seats forming part of the architectural design, but not stuffed birds attached to movable trays in a museum fitted to receive them. *D'Eyncourt v. Gregory*, 3 Eq. 382; *Norton v. Dashwood*, (1896) 2 Ch. 427; *Viscount Hill v. Bullock*, (1897) 2 Ch. 482.

An engine put up by a tenant for life to work a colliery has been held to be removable by his executor. *Lawton v. Lawton*, 3 Atk. 13; *Lord Dudley v. Lord Warde*, Amb. 113.

#### VIII. IMPROVEMENTS BY TENANT FOR LIFE.

Tenant for  
life improves  
at his own  
risk.

Apart from the Settled Land Acts, a tenant for life who makes permanent improvements which increase the value of the inheritance, such as repairs necessitated by dry rot,



building farm buildings and cottages, draining marshes and the like, does so at his own risk, and is not entitled to a charge for his expenditure. *Hibbert v. Cooke*, 1 S. & St. 552; *Bostock v. Blakeney*, 2 B. C. C. 658; *Nairn v. Marjoribanks*, 3 Russ. 582; *Dixon v. Peacock*, 3 Dr. 288; *Caldecott v. Brown*, 2 Ha. 144; *Dunne v. Dunne*, 7 D. M. & G. 207; *Dent v. Dent*, 30 B. 363; *In re Barrington's Settlement*, 1 J. & H. 142; *In re Ormrod's Settled Estate*, (1892) 2 Ch. 318; see *In re Montagu*; *Derbshire v. Montagu*, (1897) 2 Ch. 8.

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But he will be allowed expenditure (including the costs of legal proceedings) made to preserve the property of which he is tenant for life from injury, destruction or forfeiture. *Dent v. Dent*, 30 B. 363, 369 (the Aroa Mine); *In re Earl De La Warr's Estate*, 16 Ch. D. 587; *In re Ormrod's Settled Estate*, (1892) 2 Ch. 318; *Hamilton v. Tighe*, (1898) 1 Ir. 123.

On this principle, he may complete a mansion-house upon the estate left unfinished by the testator, and charge the inheritance with the cost. *Hibbert v. Cooke*, 1 S. & St. 552; *Dent v. Dent*, 30 B. 363.

And if he completes houses commenced by a testator on a building estate he may be entitled to the expenditure, if but for the outlay the buildings would have been lost to the estate. *Ferguson v. Ferguson*, 17 L. R. Ir. 567; *Gilliland v. Crawford*, 1 R. 4 Eq. 35.

A tenant for life who purchases land under a statutory right of pre-emption, which he can only exercise as trustee for the persons entitled under the settlement, and then makes improvements upon it, may be allowed in his capacity of trustee and not of tenant for life the amount by which the value of the land has been increased. *Rowley v. Ginnerver*, (1897) 2 Ch. 503.

## IX. CHARGES AND INCUMBRANCES.

### A. RENT-CHARGES.

The tenant for life must keep down rent-charges upon the estate, and he is personally liable to pay them though the rents and profits may be insufficient. *Thomas v. Sylrester*, L. R. 8

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Q. B. 368; *Christie v. Barker*, 53 L. J. Q. B. 537; *Searle v. Cooke*, 43 Ch. D. 519; *Swift v. Kelly*, 24 L. R. Ir. 107, 478; *Odlum v. Thompson*, 31 L. R. Ir. 394; *Pertwee v. Townsend*, (1896) 2 Q. B. 129; *In re Herbage Rents, Greenwich*; *Charity Commissioners v. Green*, (1896) 2 Ch. 811.

Annuity in  
nature of a  
debt.

If the testator has entered into a covenant to pay an annuity or rent-charge, which is also charged on the land, and the annuity or rent-charge is in the nature of a debt of the testator, for instance, if the annuity is granted in consideration of a loan or as the purchase-money of the estate, it must, as between tenant for life and remainderman, be capitalised, and the burden borne in proportion to the value of their respective interests. *Bulwer v. Astley*, 1 Ph. 422; *Yates v. Yates*, 28 B. 637; *Yonge v. Furze*, 20 B. 380; *In re Muffett*; *Jones v. Mason*, 39 Ch. D. 534.

Another mode of apportioning the liability in such a case is that the tenant for life should pay the annuity as it accrues, in which case he will be entitled to a charge on the estate for the amount, but not to interest during his life on such charge. *In re Harrison*; *Townson v. Harrison*, 43 Ch. D. 55.

**B. INTEREST ON MORTGAGES.**

Interest on  
mortgages.

The tenant for life must keep down the interest on incumbrances upon the estate falling due while he is in possession to the extent of the income he receives, and surplus rents of later years must be applied in making up a deficit of earlier years. He is not bound to keep down arrears of interest accrued before his possession. *Dixon v. Peacock*, 3 Dr. 288; *Caulfield v. Maguire*, 2 J. & Lat. 141; *Whitbread v. Smith*, 3 D. M. & G. 741; *Making v. Making*, 1 D. F. & J. 358; *Sharshair v. Gibbs*, Kay, 333; *Tracy v. Lady Hereford*, 2 B. C. C. 128; *Kirwan v. Kennedy*, 1 R. 4 Eq. 499.

Back rents.

The tenant for life is not personally liable to the mortgagee for such interest, and if he receives rents without keeping down the interest he cannot be sued by the mortgagee for back rents. *In re Morley*; *Morley v. Saunders*, 8 Eq. 594.

If the rents and profits of a portion of the estate comprised in a mortgage are not sufficient to keep down the interest on the mortgage, the rents and profits of other parts of the estate

not included in the mortgage must be applied for the purpose. *Frewen v. Law Life Assurance Society*, (1896) 2 Ch. 511.

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If the tenant for life does not keep down the interest to the extent of the rents and profits he receives, his estate may be sued by the remainderman for what the latter has to pay, owing to the tenant for life's default. *Baldwin v. Baldwin*, 4 Ir. Ch. 501; 6 Ir. Ch. 156, where Lord Romilly's dictum in *Kensington v. Bouverie*, 19 B. 39, is explained.

Liability to remainderman.

If the remainderman has to pay interest on incumbrances which accrued during the life tenancy, and rents accrued during the life tenancy are afterwards recovered, it seems that in equity such rents, so far as required to recoup the remainderman, will be considered as belonging to the reversion. The right is not a mere lien, but the rents belong to the remainderman and he will take any accumulations produced by their investment. *Waring v. Coventry*, 2 M. & K. 406; *Kirwan v. Kennedy*, I. R. 3 Eq. 472; *Coote v. O'Reilly*, 1 J. & Lat. 455; *Howlin v. Sheppard*, I. R. 6 Eq. 38, 497, 532; see *Dillon v. Dillon*, 4 Ir. Ch. 102; *In re Fitzgerald's Estate*, I. R. 1 Eq. 453.

Subsequent rents liable to make up arrears.

If the tenant for life pays interest on incumbrances in excess of the income received he is not entitled to a charge for the excess, nor can he recover it from the remainderman. *Kensington v. Bouverie*, 7 H. L. 557.

Tenant for life paying in excess of rents.

### C. REDEMPTION OF INCUMBRANCES.

The tenant for life may redeem incumbrances in priority to the remainderman. He cannot himself be redeemed, nor can he foreclose. *Ravald v. Russell*, You. 19; *Raffety v. King*, 1 Kee. 618; *Aynsley v. Reed*, 1 Dick. 249; *Wicks v. Scrivens*, 1 J. & H. 215; *Prout v. Cock*, (1896) 2 Ch. 508.

Right to redeem.

If he pays off an incumbrance on the estate he is presumed to do so for his own benefit, and the presumption is not rebutted by the mere fact that the remaindermen are children of the tenant for life. *Jones v. Morgan*, 1 B. C. C. 206; *Shrewsbury v. Shrewsbury*, 1 Ves. Jun. 227; *Redington v. Redington*, 1 Ba. & Be. 131; *Burrell v. Earl of Egremont*, 7 B. 205; *Lindsay v. Earl of Wicklow*, I. R. 7 Eq. 192; *In re*

Tenant for life paying off incumbrances.

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*Harvey*; *Harvey v. Hobday*, (1896) 1 Ch. 137; *Lord Gifford v. Lord Fitzhardinge*, (1899) 2 Ch. 32.

#### D. ESTATE DUTY.

Estate duty  
in respect of  
jointure.

For the purpose of ascertaining the estate duty payable by a jointress, the jointress is to be treated as tenant for life of a sum equal to the value of the jointure, capitalised at the number of years' purchase at which the estate as a whole was capitalised for the purpose of duty, and she is to be charged with estate duty on that sum, but she is entitled to throw the duty so charged upon the corpus of the estate upon the terms of paying interest to the tenant for life at the rate actually paid to the Crown until payment of the duty, and thereafter at the rate at which the duty could be raised by mortgage of the estate. *In re Parker Jervis*; *Salt v. Locker*, (1898) 2 Ch. 643.

#### X. POWERS OF LEASING.

Leasing  
powers.

Large powers of leasing are conferred upon tenants for life by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

Unlimited  
power.

Where express power of leasing is given without limit of time it is a question of construction upon the whole instrument whether the power authorises leases beyond the life of the tenant for life. *Virian v. Jegon*, L. R. 3 H. L. 285.

Contract for  
a lease.

Under the Settled Land Act, 1882, sect. 31 (2), a contract by a tenant for life for a lease binds the remainderman.

Independently of the Act, a contract for a lease by a tenant for life with power of leasing, if the lease contracted for was within the power, bound the remainderman. *Shannon v. Bradstreet*, 1 Sch. & L. 52; see *Morgan v. Milman*, 3 D. M. & G. 24.

Covenant to  
renew lease.

And a covenant by a tenant for life to renew a lease at the expiration of an existing lease, though the covenant to renew is not authorised by the power, will bind the tenant for life if, when the time for renewal arrives, the renewed lease is within the power. *Harnett v. Yielding*, 2 Sch. & L. 549; *Doe d. Bromley v. Bettison*, 12 East, 305; *Dowell v. Dew*, 1 Y. & C. C. 345; 7 Jur. 117; *Gas Light and Coke Co. v. Touse*, 35 Ch. D. 519.

## XI. FIDUCIARY POSITION OF TENANT FOR LIFE.

In some respects the tenant for life is in a fiduciary position as regards the estate.

If he pays off an incumbrance he can charge the inheritance only with the amount paid. *Hill v. Browne*, Dru. t. S. 426. Purchase of incumbrances.

A sum received by a tenant for life for withdrawing opposition to a bill must be invested for the benefit of the estate. *Owen v. Williams*, Amb. 734; *Pole v. Pole*, 2 De G. & S. 420; *Re Duke of Marlborough's Estate*, 13 Jur. 738; *Earl of Shrewsbury v. North Staffordshire Ry.*, L. R. 1 Eq. 593, 608; see *Yem v. Edwards*, 3 K. & J. 564; 1 De G. & J. 598.

There is no duty imposed upon either legal or equitable tenants for life of renewable leaseholds to renew. *Nightingale v. Lawson*, 1 B. C. C. 443; *White v. White*, 4 Ves. 32; 9 Ves. 561; *Stone v. Theed*, 2 B. C. C. 248; *Montford v. Cadogan*, 19 Ves. 633; *Capel v. Wood*, 4 Russ. 500; *O'Ferrall v. O'Ferrall*, Ll. & G. t. P. 79; *Lawrence v. Maggs*, 1 Ed. 453; see *Trench v. St. George*, 1 Dr. & Wal. 417. Duty as regards renewable leaseholds.

If the tenant for life does renew he will be taken to renew for the benefit of the estate though he may be himself the settlor. *Coppin v. Fernyhough*, 2 B. C. C. 291; *Bowles v. Stewart*, 1 Sch. & L. 209; *Giddings v. Giddings*, 3 Russ. 241; *Hill v. Mill*, 12 Ir. Eq. 107; *Mill v. Hill*, 3 H. L. 828.

It makes no difference that a particular renewal is directed to enure for the benefit of the trust. *Tanner v. Elworthy*, 4 B. 487.

A purchase of the reversion by the tenant for life of renewable leaseholds enures for the benefit of the estate. *Phillips v. Phillips*, 29 Ch. D. 673. Purchase of reversion.

If there is no trust to renew he is entitled to a charge for the purchase-money.

If the fee is conveyed on the trusts of the will, the first tenant in tail who would have been absolutely entitled to the leaseholds is entitled to an interest equivalent to the residue of the term which would have been left at the death of the tenant for life. *Isaac v. Wall*, 6 Ch. D. 706.

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Tenant for  
life may pur-  
chase estate.

Purchase of  
reversion.

Policy  
moneys.

If the fee is conveyed to the tenant for life the first tenant in tail is absolutely entitled. *Isaac v. Wall*, 6 Ch. D. 706.

The tenant for life may purchase the estate if sold under a power though the power is exercisable with his consent. *Dicconson v. Talbot*, 6 Ch. 32; *Howard v. Ducane*, T. & R. 81.

And he may purchase for himself the reversion subject to a lease of which he is tenant for life. *Randall v. Russell*, 3 Mer. 190; *Longton v. Wilsby*, 76 L. T. 770.

If the will contains no trust to insure and a policy is effected by the tenant for life, it would seem that the policy moneys belong to him. *Seymour v. Vernon*, 16 Jur. 189; *Warwicker v. Bretnall*, 23 Ch. D. 188.

As to the effect of the resumption by a tenant for life of a holding under sect. 21 of the Land Law (Ireland) Act, 1881, see *Martin v. Martin*, (1898) 1 Ir. 112.

## XII. ESTOPPEL AGAINST TENANT FOR LIFE.

Estoppel  
where testator  
had no title  
or an imper-  
fect title.

If tenant for life under a will enters into possession of land devised by a specific description to which the testator had either no title or an imperfect title, and the tenant for life acquires a title by possession against the true owner, the tenant for life cannot claim the land as against the remainderman. *Hawksbee v. Hawksbee*, 11 Ha. 230; *Anstee v. Nelms*, 1 H. & N. 225; *Board v. Board*, L. R. 9 Q. B. 48; *Dalton v. Fitzgerald*, (1897) 1 Ch. 440; 2 Ch. 86.

A distinction has been made between these cases and a case where a testator having a good title to land makes a devise which does not include it, and the tenant for life enters thinking that it does. In such a case it has been said there is no estoppel. See *Paine v. Jones*, 18 Eq. 320; *In re Stringer's Estate*, 6 Ch. D. 1; see *Dalton v. Fitzgerald*, *supra*.

In *Scott v. Nixon*, 3 Dr. & War. 388; *Kernaghan v. McNally*, 12 Ir. Ch. 89, the point was whether beneficiaries entering upon land in the belief that it passed to them under a residuary devise, when in fact it did not, acquire the legal estate for themselves or for their trustee under the will. The two decisions appear to be inconsistent.

## XIII. RENEWABLE LEASEHOLDS.

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In the case of fines for the renewal of leaseholds given for life with remainders, the Court will, if no directions are given how the fine is to be paid, apportion the fine between tenant for life and remainderman according to their enjoyment.

Court apportionments liability for fines.

A direction to renew "out of rents and profits" or to renew "out of rents and profits or by mortgage" will not alone throw the fines upon the tenant for life. *Allan v. Backhouse*, 2 V. & B. 85, on appeal, Law Mag. vol. 25, p. 112; *Greenwood v. Erans*, 4 B. 44; *Jones v. Jones*, 5 Ha. 440; *Reeves v. Creswick*, 3 Y. & C. Ex. 715; *Lewin on Trusts*, 408; *Ainslie v. Harcourt*, 28 B. 313; see *In re Marquess of Bute*; *Marquess of Bute v. Ryder*, 27 Ch. D. 196.

Effect of direction to renew.

But the will may throw the expense of renewals upon the tenant for life, for instance, by imposing the duty of renewal upon him personally by name (a); by a trust to renew out of rents and profits, and a gift of the rents and profits to him subject to the trust (b); or of the surplus rents and profits only (c); or by a direction to pay fines out of the annual rents (d). *Blake v. Peters*, 1 D. J. & S. 345 (a); *Lord Montford v. Lord Cadogan*, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3; *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 111 (b); *Stone v. Theed*, 2 B. C. C. 247; 5 Ha. 451, n. (c); *Solley v. Wood*, 20 B. 482 (d).

If the fines are to be raised out of the rents and profits or by mortgage, the tenant for life is bound to keep down the interest on the whole sum if raised by mortgage and not merely upon that portion of it which is ultimately paid by him. *Greenwood v. Erans*, 4 B. 44; *Playters v. Abbott*, 2 M. & K. 97; *Reeves v. Creswick*, 3 Y. & C. Ex. 715; *Ainslie v. Harcourt*, 28 B. 313; *Jones v. Jones*, 5 Ha. 440.

Fines raised by mortgage.

In the absence of any direction how the cost of renewal is to be borne, the rules are:—

Apportionment of costs of renewal.

a. If the tenant for life gets no advantage from the renewal, the sum to be paid by the remainderman is the sum actually paid with compound interest at 4 per cent. down to the death of the tenant for life and simple interest afterwards.

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*Nightingale v. Lawson*, 1 B. C. C. 440; *White v. White*, 9 Ves. 557; *Giddings v. Giddings*, 3 Russ. 260.

b. If the tenant for life lives to enjoy the benefit of the renewal, the remainderman has to pay a sum bearing the same proportion to the whole sum paid as the benefit he gets from the renewal bears to the whole of the renewed lease with interest as before; cases *supra*.

c. In the case of renewable leaseholds for lives the same principles apply, the value of the lives being calculated at the time of the renewal according to the tables framed for the purpose, the chance that the new life may fail during the subsistence of the other *cestuis que vie* being apparently thrown upon the remainderman. *Jones v. Jones*, 5 Ha. 440; *Harris v. Harris*, 32 B. 383; *Bradford v. Brownjohn*, 3 Ch. 711.

Title to fund  
for renewal  
when renewal  
impossible.

If the testator has directed the creation of a fund for renewal out of the rents, and the power of renewal is subsequently destroyed, the remainderman will be entitled to the fund for renewal, or to the purchase-money if the leaseholds are sold as soon as renewal becomes impossible, if the object of the testator was to keep the leaseholds perpetually renewed at any cost. *In re Wood's Estate*, 10 Eq. 572; *Hollier v. Burne*, 16 Eq. 163; *Maddy v. Hale*, 3 Ch. D. 327; see *In re Lord Ranelagh's Will*, 26 Ch. D. 591.

The fund must be invested in ordinary securities, and the tenant for life takes the dividends. *In re Barber's Settled Estates*, 18 Ch. D. 624.

If renewal becomes impossible through the act of the testator, the trust is at an end. *Pinfold v. Shillingford*, 46 L. J. Ch. 491; 25 W. R. 425.

If only a reasonable sum is to be applied in renewals, the tenant for life will be entitled to the whole fund. *Morris v. Hodges*, 27 B. 625; *In re Money's Trusts*, 2 Dr. & Sm. 94; 10 W. R. 399; see *Hayward v. Pile*, 5 Ch. 214.

#### XIV. RIGHT TO POSSESSION.

Court may  
let equitable  
tenant for  
life into  
possession.

An equitable tenant for life is not entitled as of right to possession, but the Court has a judicial discretion as to giving him possession, and having regard to the large powers conferred



upon tenants for life by the Settled Land Acts, an equitable tenant for life, and a person having the powers of a tenant for life, will be let into possession upon proper undertakings for the protection of the estate. *In re Bentley*, 54 L. J. Ch. 782; *In re Wythes*; *West v. Wythes*, (1898) 2 Ch. 369; *In re Bagot's Settlement*; *Bagot v. Kittoe*, (1894) 1 Ch. 177; *In re Richardson*; *Richardson v. Richardson*, W. N. 1900, 3.

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As a general rule a tenant for life of chattels is bound to sign an inventory, but not to give security. *Foley v. Burnell*, 1 B. C. C. 279; *Conduitt v. Soane*, 1 Coll. 285.

Inventory of  
chattels.

### XV. TITLE DEEDS.

The right of possession of the title deeds follows the legal estate; therefore legal tenant for life is entitled to the title deeds. *Garner v. Hannington*, 22 B. 627, 630; *Allwood v. Heywood*, 1 H. & C. 745; *Leathes v. Leathes*, 5 Ch. D. 221.

Legal tenant  
for life  
entitled to  
title deeds.

But if there is any probability that he will make a wrongful use of them, as for instance by taking them out of the jurisdiction, or if they are required for the purposes of an action, they may be secured in Court. *Jenner v. Morris*, L. R. 1 Ch. 603; *Stanford v. Roberts*, 6 Ch. 310.

The remainderman is entitled to have the title deeds produced for the purposes of a sale or otherwise where there is no dispute about his title. *Davies v. Earl of Dysart*, 20 B. 405; *Pennell v. Earl of Dysart*, 27 B. 542.

And possession of the title deeds will also be given to an equitable tenant for life upon an undertaking not to part with them and produce them to the trustees on all reasonable occasions. *In re Burnaby's Settled Estate*, 42 Ch. D. 621; *In re Wythes*; *West v. Wythes*, (1898) 2 Ch. 369.

Equitable  
tenant may  
have possession  
of title deeds.

### XVI. CAPITAL AND INCOME.

1. Trees blown down and severed from the soil before the testator's death belong to his estate. The question whether the tree is severed or not is one of fact. *In re Ainslie*; *Swinburn v. Ainslie*, 30 Ch. D. 485.

Trees blown  
down before  
the death.

2. Fines payable on the renewal of leases subject to which an estate is devised, fines on admission to copyholds, and casual

Fines and  
casual profits.

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profits belong to the tenant for life. *Earl Cowley v. Wellesley*, 35 B. 695 ; L. R. 1 Eq. 656 ; *Brigstocke v. Brigstocke*, 8 Ch. D. 357 ; *In re Meadows* ; *Norie v. Bennett*, (1898) 1 Ch. 300.

Dividends  
and profits.

3. The cases upon dividends and profits as between the estate and the specific legatee (*ante*, p. 161) are also authorities as between tenant for life and remainderman.

Fund for  
protection of  
property.

4. A fund created for the protection of property given for life is capital. *Varlo v. Faden*, 1 D. F. & J. 211.

Losses of  
business.

5. As between successive tenants for life of a business, it has been held that losses incurred during the life of one tenant for life must be made good out of profits earned during the life of the next tenant for life, and not out of capital. *Upton v. Brown*, 26 Ch. D. 588 ; see, too, *Gow v. Foster*, 26 Ch. D. 672 ; *Re Millechamp*, 52 L. T. 758.

Securities  
sold or bought  
cum dividend.

6. Where a sale is made between two dividend days so that more is realised owing to the accrued dividend, the tenant for life cannot claim any part of the purchase-money on account of dividend (*a*) ; and where a purchase is made of a security upon which some dividend has accrued due, so that the dividend may be said to some extent to be paid for out of capital the tenant for life cannot be required to make an allowance to capital (*b*). *Scholefield v. Redfern*, 2 Dr. & Sm. 173 ; *Fremantle v. Whitbread*, L. R. 1 Eq. 266 ; *Bulkeley v. Stephens*, (1896) 2 Ch. 241 (*a*) ; *In re Clarke* ; *Barker v. Perowne*, 18 Ch. D. 160 (*b*).

Under special circumstances, however, an allowance may be made to the tenant for life, for instance, if the securities are at his death to be transferred to the remainderman, in which case his estate would get the apportioned dividend, and the trustees sell them without the concurrence of his executors. *Bulkeley v. Stephens*, *supra*. See, too, *Lord Londesborough v. Somerville*, 19 B. 295 ; *Bulkeley v. Stephens*, 3 N. R. 105.

Dividends on  
shares.

7. As regards dividends on shares the tenant for life is entitled only to dividends and bonuses declared by the company. But he is entitled to dividends and bonuses so declared, though the accumulated profits of past years are applied in paying them. If the company goes into

liquidation so that no further dividend can be declared, and the assets are more than sufficient to repay the amount credited on the shares, the excess, though arising from funds representing accumulated profits, is nevertheless capital. *Bouch v. Sproule*, 12 App. C. 385; *In re Alsbury*; *Sugden v. Alsbury*, 45 Ch. D. 237; *In re Armitage*; *Armitage v. Garnett*, (1893) 3 Ch. 337. *Plumbe v. Neild*, 29 L. J. Ch. 618; *Hollis v. Allan*, 14 W. R. 980; *Nicholson v. Nicholson*, 30 L. J. Ch. 617, so far as they decide that dividend paid out of profits accumulated before the tenant for life's interest commenced does not belong to him are overruled.

8. Where a company has no power to increase its capital but has accumulated profits, which it uses in fact for capital purposes, and afterwards distributes them among its proprietors, the sums distributed are capital. *Brander v. Brander*, 4 Ves. 800; *Irving v. Houston*, 4 Paton, Sc. App. 521; *Paris v. Paris*, 10 Ves. 185; *Clayton v. Gresham*, 10 Ves. 288; *Witts v. Steere*, 13 Ves. 363; *Ex parte Hodgins*; *Re Hodgins*, 11 Ir. Eq. 99; *Ward v. Combe*, 7 Sim. 634; *Bouch v. Sproule*, 12 App. C. 385.

Accumulated  
profits of  
trading  
companies.

But where an extra dividend is paid by such a company out of the half-year's profits, the dividend is income. *Barclay v. Wainewright*, 14 Ves. 66; *Price v. Anderson*, 15 Sim. 473; *Preston v. Melville*, 16 Sim. 163.

9. Where a company has power either to distribute its profits as dividend or to convert them into capital, and the company validly exercises this power, tenant for life and remaindermen of shares in the company are bound by such exercise, and what is paid by the company as dividend goes to the tenant for life, and what is appropriated as capital enures for the benefit of the remaindermen. *In re Barton's Will*, 5 Eq. 238; *Dale v. Hayes*, 19 W. R. 299; *In re Hopkins' Trusts*, 18 Eq. 696; *In re Bouch*; *Sproule v. Bouch*, 29 Ch. D. 635; *S. C.*, *Bouch v. Sproule*, 12 App. C. 385; *In re Alsbury*; *Sugden v. Alsbury*, 45 Ch. D. 237; *In re Malam*; *Malam v. Hitchens*, (1894) 3 Ch. 578.

Dividends  
and bonuses.

It is a common transaction for companies to declare a dividend out of accumulated profits and at the same time

Capitalisation  
of accumulated  
profits.

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to allot new shares to each shareholder equal in nominal amount to the dividend he is entitled to, the intention being to keep the dividend in the company's coffers. It is not easy to determine whether the transaction amounts to a capitalisation of the dividend. The mere fact that the shareholder has the option of taking the dividend in cash without taking the shares is not conclusive. If the case is one in which no shareholder would for his own sake refuse the shares, it is much the same as if he had no option. If the issue of new capital and the payment of the dividend are independent transactions, the dividend is not capitalised. *Bouch v. Sproule, supra*; *In re Northage*; *Ellis v. Barfield*, 60 L. J. Ch. 488; 64 L. T. 625; *In re Malam*; *Malam v. Hitchens*, (1894) 3 Ch. 578.

Allotment of  
new shares.

New shares allotted in respect of old shares are capital, and if they are sold for more than they cost the excess is capital. If they are paid for out of dividends the tenant for life is entitled to a charge upon them for the amount so paid. *Rowley v. Unwin*, 2 K. & J. 138; *In re Northage*; *Ellis v. Barfield*, 60 L. J. Ch. 488; 64 L. T. 625; *In re Malam*; *Malam v. Hitchens*, (1894) 3 Ch. 578; *Re Bromley*; *Sanders v. Bromley*, 55 L. T. 145.

## XVII. RESIDUE GIVEN TO PERSONS IN SUCCESSION.

### A. Where there is a trust to convert.

Residue  
given on  
trust to sell  
must be  
treated as  
sold.

Where a residue is given upon trust for sale and investment, and the income is then given to a tenant for life, the tenant for life is, in the absence of proper directions, only entitled to such income as the estate would produce when converted and invested in accordance with the directions of the will.

Reversion  
must be  
converted.

And he is entitled to have reversionary property converted, though the reversion is dependent on his own life (a); unless the testator shows that he does not intend the reversion to be dealt with as part of his estate until it falls into possession (b). *Wilkinson v. Duncan*, 23 B. 469; *Johnson v. Routh*, 27 L. J. Ch. 805; 3 Jur. N. S. 1041; *Countess of Harrington v. Atherton*, 2 D. J. & S. 352; *Rowls v. Bebb*, W. N. 1900, 108 (a); *Re Flower*; *Matheson v. Goodwyn*, 63 L. T. 201 (b).

A direction that no property not actually producing income is to be treated as producing income would prevent the tenant for life from claiming income in respect of a reversion, but it would not deprive him of the right to have a debt, part of which is recovered, apportioned between capital and income.

*In re Hubbuck ; Hart v. Stone*, (1896) 1 Ch. 754.

In some old cases, where land was devised on trust for sale with all convenient dispatch and was not sold, the tenant for life was allowed the rents and profits of the land after the expiration of a year: *Vickers v. Scott*, 3 M. & K. 500; *Vigor v. Harwood*, 12 Sim. 172. The tenant for life got no income at all for a year. Now the tenant for life would be allowed interest on the value from the testator's death: *Wentworth v. Wentworth*, (1900) A. C. 163.

In the case of a deed where land was settled on trust for sale with no power to postpone, and there was no delay in conversion, it was held that the tenant for life was entitled to the rents of the land received before conversion though they were more than 4 per cent. on the purchase-money. *Hope v. D'Hédouville*, (1898) 2 Ch. 361.

The fact that certain property is excepted from the trust for conversion will not entitle the tenant for life to the profits earned by the excepted property if it is excepted for the purpose of special directions for its management. *Arnold v. Ennis*, 2 Ir. Ch. 601.

Where the trust was to convert such portion of the estate as should not be invested in the public funds and the income of the residue was given to a tenant for life, it was held that Long Annuities being public funds need not be converted, and that the tenant for life was entitled to enjoy them in specie. *Howard v. Kay*, 27 L. J. Ch. 448; *Wilday v. Sandys*, 7 Eq. 455; see *Tickner v. Old*, 18 Eq. 422.

Power conferred upon trustees to postpone a sale or to retain securities unconverted will not alter the rights of tenant for life and remainderman.

But if in such a case what is given to the tenant for life is the income of the converted and unconverted property or the income of the securities representing the estate, he will

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Direction as to property not producing income.

Land devised on trust for sale.

Rents until sale.

Exception of certain property.

Long Annuities.

Powers of management do not alter rights.

Gift of unconverted residue.

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be entitled to the income of securities retained. *Wrey v. Smith*, 14 Sim. 202; *In re Thomas*; *Wood v. Thomas*, (1891) 3 Ch. 483.

Direction to  
apply income  
of unconverted  
estate.

Again, the testator may expressly direct the income of any part of the estate remaining unconverted to be applied in the same way as the income of the converted estate. In such a case the tenant for life will be entitled if the testator's capital is left in a business to the interest and profits made by the capital, and if the testator's business is carried on to the profits of the business (a). On the other hand, if in the exercise of their discretion, the trustees retain a reversion, the tenant for life will not be entitled to any income in respect of the reversion (b). *Mackie v. Mackie*, 5 Ha. 70; *Morley v. Mendham*, 2 Jur. N. S. 998; *Johnston v. Moore*, 27 L. J. Ch. 453; *Lean v. Lean*, 32 L. T. 305; 23 W. R. 484; *Waters v. Waters*, 32 L. T. 306, n.; *In re Chancellor*; *Chancellor v. Brown*, 26 Ch. D. 42; *In re Crowther*; *Midgley v. Crowther*, (1895) 2 Ch. 56 (a). *Rowlls v. Bebb*, W. N. 1900, 108 (b).

B. Where there is no trust to convert.

Rule in  
*Howe v. Lord*  
*Dartmouth*.

In such a case the rule is that when a residue of personalty is given *en masse* to several persons successively, wasting property, and property invested in a manner not authorised by the will, must be converted, unless it appears from the will that specific enjoyment by the tenant for life was intended. *Howe v. Lord Dartmouth*, 7 Ves. 137; *Johnson v. Johnson*, 2 Coll. 441; *Meyer v. Simonsen*, 5 De G. & S. 723; *Blann v. Bell*, 2 D. M. & G. 775; *Thornton v. Ellis*, 15 B. 193; *Macdonald v. Irvine*, 8 Ch. D. 101; see *Wightwick v. Lord*, 6 H. L. 217.

Rule does not  
apply to  
realty.

The rule is limited to personalty, and the tenant for life is not entitled to any allowance if real estate forming part of a residue devised for life is unproductive. *Yates v. Yates*, 28 B. 637.

The fact that the residuary gift includes real estate, the devise of which is specific, does not entitle the tenant for life to specific enjoyment of the residuary personalty. *Howe v. Lord Dartmouth*, *supra*.

Extent of  
rule.

The rule in *Howe v. Lord Dartmouth*, "must be applied

unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied, the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case," per James, L.J., *Macdonald v. Irvine*, 8 Ch. D. p. 124.

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The rule gives way more readily to an indication of contrary intention in the case of an absolute gift followed by an executory gift over. *In re Bland*; *Miller v. Bland*, (1899) 2 Ch. 336.

The cases are numerous in which the question has been discussed, whether a sufficient intention has been shown to take the case out of the rule. Probably they are not all consistent with each other. It is proposed shortly to summarise them here.

1. An intention to give the tenant for life enjoyment in specie may be gathered from the language of the residuary gift. Where the gift is residuary a mere enumeration of particulars in the residuary gift will not alone entitle the tenant for life to enjoyment in specie, more especially if it is plain that some of the enumerated particulars, such as debts, cannot be intended to remain outstanding. *Sutherland v. Cooke*, 1 Coll. 498.

Rule excluded  
by language  
of residuary  
gift.

If the true construction is that the gift is not residuary but a specific gift of the enumerated things, the tenant for life is entitled to specific enjoyment. *Bethune v. Kennedy*, 1 M. & Cr. 114; *Vaughan v. Buck*, 1 Ph. 75; *Lord v. Godfrey*, 4 Mad. 455; *Vincent v. Newcombe*, You. 599; *Hubbard v. Young*, 10 B. 203; *Boys v. Boys*, 28 B. 436.

Gift specific.

If the gift to the tenant for life is of property in every shape and in whatever manner it is situated, and the property "so left" is given to the remainderman, the tenant for life is entitled to specific enjoyment. *Collins v. Collins*, 2 M. & K. 703; see *Pickering v. Pickering*, 4 M. & Cr. 289; *Harvey v. Harvey*, 5 B. 134.

And if the testator distinguishes between the enumerated things and the residue by such words as firstly and secondly, the tenant for life may be entitled to specific enjoyment of

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the former. *Oakes v. Strachey*, 13 Sim. 414; see *Hood v. Clapham*, 19 B. 90.

Effect of  
word "rents"  
as regards  
leaseholds.

2. Upon the question whether a gift of the "rents" and income of the residue to the tenant for life is sufficient to entitle him to specific enjoyment of leaseholds, the better opinion appears to be that if the gift is of residuary real and personal estate, the word rents is satisfied by being referred to the real estate. *In re Game*; *Game v. Game*, (1897) 1 Ch. 881; approving dicta in *Harris v. Poyner*, 1 Dr. 174, 179; *Craig v. Wheeler*, 29 L. J. Ch. 374, 376, and not following dicta in *Crowe v. Crisford*, 17 B. 507; *Wearing v. Wearing*, 28 B. 99; *Vachell v. Roberts*, 32 B. 140; see, too, *Pickup v. Atkinson*, 4 Ha. 624; *Marshall v. Bremner*, 2 Sm. & G. 237; *Booth v. Coulton*, 7 Jur. N. S. 207.

It seems immaterial whether the testator had or had not real estate at the date of his will or death, as after-acquired real estate would pass.

Under the old law, if the testator had no freeholds at the date of his will, as after-acquired freeholds could not pass, it was necessary to refer the word rents to leaseholds, and accordingly the tenant for life was entitled to specific enjoyment of them. It seems the same result would follow in a modern will if the residuary gift is so limited as to exclude freeholds. *Goodenough v. Tremamondo*, 2 B. 512.

Effect of  
gift over.

3. An intention to give specific enjoyment may be inferred from the gift over after the death of the tenant for life.

Thus, a gift of a specific part of the residue at the death of the tenant for life entitles the tenant for life to enjoyment of that part in specie. *House v. Way*, 12 Jur. 958; 18 L. J. Ch. 22; *Holgate v. Jennings*, 24 B. 623; *Harris v. Poyner*, 1 Dr. 174; *Collins v. Collins*, 2 M. & K. 703; *D'Aglic v. Fryer*, 12 Sim. 1.

Powers  
conferred on  
trustees.

4. Specific enjoyment may be inferred from directions given to trustees.

Thus, an express trust to convert at the death of the tenant for life (a), or not to convert for a given time (b), or without the consent of the parties (c), entitles the tenant for life to specific enjoyment in the meantime. *Alcock v. Slopier*, 2 M. & K.



699; *Hunt v. Scott*, 1 De G. & S. 219; *Harvey v. Harvey*, 5 B. 134; *Bethune v. Kennedy*, 1 M. & Cr. 114; *Daniel v. Warren*, 2 Y. & C. C. 290; *Rowe v. Rowe*, 29 B. 276 (a); *Green v. Britten*, 1 D. J. & S. 649 (b); *Hinves v. Hinves*, 3 Ha. 609 (c). *Mills v. Mills*, 7 Sim. 501, seems not in accord with other authorities.

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And a power given to the trustees to sell at their discretion is inconsistent with an immediate sale, and entitles the tenant for life to enjoyment in specie. *Burton v. Mount*, 2 De G. & S. 383; *Bowden v. Bowden*, 17 Sim. 65; *Simpson v. Lester*, 4 Jur. N. S. 1269; *Skirving v. Williams*, 24 B. 275; *In re Leonard*; *Theobald v. King*, 29 W. R. 234; *In re Pitcairn*; *Brandreth v. Colrin*, (1896) 2 Ch. 199; see *Jebb v. Tugwell*, 20 B. 84; *Re Llewellyn's Trust*, 29 B. 171. Power of sale.

A direction to sell certain parts of the personal estate without any similar direction as to the residue, is not of much weight as showing that the residue is not to be converted. *Cafe v. Bent*, 5 Ha. 34.

And a trust by sale of the residue or so much as is necessary to pay debts and legacies, has been held not to entitle the tenant for life to enjoy what remains in specie. *Sutherland v. Cooke*, 1 Coll. 498; see *Johnson v. Johnson*, 2 Coll. 441.

Again, if power is given to repair and renew (a), or demise (b), or discharge incumbrances upon (c), leaseholds, this is inconsistent with an immediate sale, and the tenant for life may enjoy the leaseholds in specie. *Crowe v. Crisford*, 17 B. 507; *Thursby v. Thursby*, 19 Eq. 395 (a); *Hind v. Selby*, 22 B. 373 (b); *In re Sewell's Estate*, 11 Eq. 80 (c). Power to repair leaseholds, &c.

If there is a power to retain specifically named investments the tenant for life is entitled to the income of those in specie. *Brown v. Gellatly*, L. R. 2 Ch. 751. Power to retain.

And it would seem that a general power to retain any part of the estate, as invested at the testator's death, would have the effect of giving the tenant for life the income of portions retained. However, in *Porter v. Baddeley*, 5 Ch. D. 542, the tenant for life was not allowed the income of a wasting security. In *Gray v. Siggers*, 15 Ch. D. 75; *In re Sheldon*;

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Power given  
for benefit  
of estate.

*Nixon v. Sheldon*, 39 Ch. D. 50, both authorities in favour of the tenant for life, the power was either to retain or sell.

A power to sail ships "for the benefit of my estate" was held not to give the tenant for life the earnings in specie. *Brown v. Gellatly*, *supra*.

It has been said that a power to vary securities is in favour of the view that the testator intended conversion. *Morgan v. Morgan*, 14 B. 72, 85.

Debts must  
be got in.

Where the tenant for life is entitled to the enjoyment in specie of the property of the testator as existing at his death, the debts must nevertheless be got in. *Holgate v. Jennings*, 24 B. 623.

C. Where there is no right to specific enjoyment, the following rules apply as between tenant for life and remainderman:—

What  
residue is.

1. The residue is what remains after taking such portions of the capital as, together with the income of such portion for one year, whatever that income may be, is required to pay the testator's debts and legacies. *Allhusen v. Whittell*, 4 Eq. 294; *Lambert v. Lambert*, 16 Eq. 320; *Marshall v. Crouther*, 2 Ch. D. 199; *Aikin v. Butler*, Seton on Decrees, p. 1412.

Property  
properly  
invested.

2. The tenant for life is entitled from the testator's death to the income of so much of the property as is invested on authorised securities. *Angerstein v. Martin*, T. & R. 232; *Hewitt v. Morris*, *ib.* 241; *Brown v. Gellatly*, L. R. 2 Ch. 751; reversing *Stott v. Hollingworth*, 3 Mad. 161; *Taylor v. Hibbert*, 1 J. & W. 308, so far as *contra*.

Unauthorised  
securities.

3. With regard to unauthorised securities, the tenant for life is entitled from the testator's death to the income which would be produced by the money upon unauthorised security, if invested on authorised security at the end of a year from the testator's death. *Dimes v. Scott*, 4 Russ. 195; *Taylor v. Clark*, 1 Ha. 161; *Brown v. Gellatly*, L. R. 2 Ch. 751.

In some cases the investment in authorised securities has been treated as made at the testator's death. *Hume v. Richardson*, 4 D. F. & J. 29; 31 L. J. Ch. 713.

It may be that a retained security stands above par and pays less than 3 per cent. upon its value, so that the amount paid to the tenant for life might have to be paid partly out of

capital. It has not been decided whether the rule applies in such a case.

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Again, the residue may include securities which produce less than the interest on their value, while others produce more. Must the residue be dealt with as an aggregate fund, or must each security be dealt with separately? Perhaps the answer is that the payments to the tenant for life are provisional only, and that the account must be readjusted when the securities are realised, and that in the meantime security must be taken for any over-payment to the tenant for life. See *Wentworth v. Wentworth*, (1900) A. C. 168, p. 172.

4. With regard to property which cannot be converted within the year or which is retained under a power to retain, the tenant for life is entitled from the testator's death to interest upon the then value of such property. *Gibson v. Bott*, 7 Ves. 89; see 1 Y. & C. C. 320, n.; *Meyer v. Simonsen*, 5 De G. & S. 728; *Brown v. Gellatly*, L. R. 2 Ch. 751; *Furley v. Hyder*, 42 L. J. Ch. 626; *In re Eaton*; *Daines v. Eaton*, 70 L. T. 761.

Property  
which cannot  
be converted.

Where a fund is without authority employed in a business in which large profits are earned, the tenant for life is entitled to interest on the fund and on the profits exceeding the interest allowed, which must be treated as capital. *In re Hill*; *Hill v. Hill*, 50 L. J. Ch. 551.

5. Where personalty is directed to be laid out in land the tenant for life is entitled to the income from the testator's death. *Macpherson v. Macpherson*, 1 Macq. 248; 1 Pat. 108.

Personalty to  
be laid out in  
land.

If the income is to be accumulated and laid out with the principal, one year is allowed for accumulation. *Sitwell v. Barnard*, 6 Ves. 520.

6. Reversionary property must be sold under trusts for conversion, and if the testator gives his trustees a discretion as to the period of conversion, interest will be allowed upon the value of the reversion at the end of a year from the death. *Wilkinson v. Duncan*, 23 B. 469; *Johnson v. Routh*, 3 Jur. N. S. 1041; 27 L. J. Ch. 305; *Countess of Harrington v. Atherton*, 2 D. J. & S. 352.

Reversionary  
property must  
be sold.

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Income of  
fund to pay  
contingent  
or vested  
legacies.

7. The tenant for life is entitled to the income of a fund set apart to pay contingent legacies, or to answer reversionary annuities, and also to so much of the income of a fund set aside to answer an annuity payable at the discretion of trustees as is not wanted for the annuity. *Crawley v. Crawley*, 7 Sim. 427; *Fullerton v. Martin*, 1 Dr. & Sm. 31; *Crawley v. Dixon*, 23 B. 512; *Allhusen v. Whittell*, 4 Eq. 295; *In re Whitehead*; *Peacock v. Lucas*, (1894) 1 Ch. 678.

But where a tenant for life of a residue with power to appoint appointed it for life and the residue included a fund set aside to answer legacies under the will of the first testator, which were vested but had not become payable, it was held that the appointor must be held to be entitled to a terminable annuity equal to the income of the fund, and that that income must be invested and the income of the investment only paid to the tenant for life under the appointment. *In re Whitehead*, *supra*.

Apportion-  
ment of  
recovered  
assets.

8. With regard to a reversion falling in before it is sold and to assets recovered after the testator's death, it is now settled, after some fluctuation of opinion, that the tenant for life is entitled to the difference between the sum received and the sum which, invested at the testator's death at the rate allowed, and calculated with yearly rests, would have amounted to that sum. *Ackroyd v. Ackroyd*, 18 Eq. 313; *Beavan v. Beavan*, 24 Ch. D. 649, n.; *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 649; *In re Hobson*; *Walker v. Appach*, 55 L. J. Ch. 422; 53 L. T. 627; 94 W. R. 70; *In re Godden*; *Teague v. Fox*, (1898) 1 Ch. 292; *In re Duke of Cleveland's Estate*; *Hay v. Wolmer*, (1895) 2 Ch. 542.

Loss on  
mortgage by  
trustees.

Where the trustees have invested on mortgage after the testator's death and there is a loss, the amount recovered will be apportioned in the proportion which the interest due under the mortgage bears to the principal. In these cases it is known what the tenant for life and remainderman ought to receive. *In re Moore*; *Moore v. Johnson*, 54 L. J. Ch. 492; 52 L. T. 510; 33 W. R. 447; *In re Foster*; *Lloyd v. Carr*, 45 Ch. D. 629; *In re Anketill's Estate*, 27 L. R. Ir. 391; *In re Hubbuck*; *Hart v. Stone*, (1896) 1 Ch. 754.

9. Where there is a recurring loss, for instance, from a leasehold property which cannot be sold, the tenant for life is chargeable with the difference between the amount of such loss and the sum which, invested at the testator's death and calculated with yearly rests, would have amounted to the sum lost. *In re Hengler; Frowde v. Hengler*, (1893) 1 Ch. 586.

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Recurring  
loss.

10. The rate of interest allowed in calculations between tenant for life and remainderman used to be 4 per cent., but now, having regard to the low rate of interest obtainable, only 3 per cent. is allowed. *In re Goodenough; Marland v. Williams*, (1895) 2 Ch. 537; *In re Duke of Cleveland's Estate; Hay v. Wolmer*, *ib.* 542; *Rowlls v. Bebb*, W. N. 1900, 108.

Rate of  
interest  
allowed.

But the higher rate will be allowed in favour of trustees who, before the rate was lowered, have allowed a tenant for life wrongly to receive the actual income of a residue. *In re Lynch Blossie; Rickards v. Lynch Blossie*, W. N. 1899, 27 (8).

Where part of the estate consisted of life policies subject to a mortgage, and the premiums and interest on the mortgage were paid out of income, the tenant for life when the policies fell in was held entitled to be repaid the premiums and interest paid, with interest thereon at 4 per cent., as the money was not trust money, but the tenant for life's own money, with which he might have earned more than 3 per cent., and the balance was apportioned in the usual way. *In re Morley; Morley v. Haig*, (1895) 2 Ch. 739.

#### XVIII. SPECIAL EQUITIES BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

1. Where land subject to a beneficial lease is taken under the Lands Clauses Consolidation Act, 1845, sect. 74, or sold under the Settled Land Act, 1882, sect. 34, the tenant for life is entitled during the continuance of the term to so much of the income of the purchase-moneys as equals the rent under the lease. The rest of the income must be accumulated until the date when the lease would have expired, and from that date the tenant for life is entitled to the whole income, including the income of accumulations. *In re Wootton's Estate*, L. R. 1 Eq. 589; *In re Mette's Estate*, 7 Eq. 72; *In*

Apportion-  
ment on sale  
of reversion.

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*re Wilkes' Estate*, 16 Ch. D. 597; *Cottrell v. Cottrell*, 28 Ch. D. 628; *In re Barrington*; *Gamlen v. Lyon*, 83 Ch. D. 523.

Apportion-  
ment on sale  
of leaseholds.

Where a leasehold interest is disposed of under one or other of these Acts the tenant for life is entitled to an annuity of such an amount that the payment of it would exhaust the purchase-money in the number of years which the leaseholds had to run. *In re Phillips' Trusts*, 6 Eq. 250; *Askeu v. Woodhead*, 14 Ch. D. 27; *Seton*, 2080.

Sum charged  
on freeholds  
and leaseholds.

2. Where a sum was charged on freeholds and leaseholds devised for life with remainders, with a discretion to trustees as to the mode of raising the charge, and they did not raise it until the value of the leaseholds had depreciated, the sum was apportioned between the value of the freeholds and leaseholds at the end of two years from the testator's death; the amount apportioned to the leaseholds was divided by the number of years the lease had then to run, and multiplied by the number of years during which the tenant for life had been in possession, and the amount so arrived at was borne by the tenant for life as regards the past and as regards the future, he was charged with an annuity for his life equal to the sum obtained by dividing the amount apportioned to the leaseholds by the number of years the lease had to run. *Blake v. O'Reilly*, (1895) 1 Ir. 479; see *Marker v. Kekewich*, 8 Ha. 291.

Trust for  
payment  
of debts out  
of income.

3. If a testator creates a trust for payment of mortgage or other debts out of the annual income of his estate, and the debts are, in fact, paid out of corpus, there is no equity to compel the tenant for life out of annual income to make good what has been so paid, and if a fund has been accumulated out of income to pay mortgage debts as directed by the will and the mortgagees are paid by sales of the mortgaged estates under order of the Court or out of Court, the tenant for life is entitled to the accumulated fund. *Tewart v. Lawson*, 18 Eq. 490; *Norton v. Johnstone*, 30 Ch. D. 649; *In re Green*; *Baldock v. Green*, 40 Ch. D. 610.

The will may, of course, be so framed as to require the execution of the trusts for payment of debts so far as to preserve the rights of the beneficiaries, although the debts are otherwise paid. *Biggar v. Eastwood*, 19 L. R. Ir. 49.

## CHAPTER XXXV.

## CONDITIONS PRECEDENT—VESTING.

## CONDITIONS DISTINGUISHED.

1. THE Court is never astute to construe a testator's words as importing a condition if a different meaning can be fairly given to them. Chap. XXXV.

Thus, a devise "upon condition" that the devisee makes certain payments within a given time will, as a rule, be construed as a trust, and not as a condition. *Young v. Grove*, 4 C. B. 668; *Wright v. Wilkin*, 9 W. R. 161; 10 W. R. 403; see *A.-G. v. Wax Chandlers*, L. R. 6 H. L. 1; *A.-G. v. Merchant Taylors*, 6 Ch. 512; and see *Bird v. Harris*, 9 Eq. 204; *Foot v. Cunningham*, I. R. 11 Eq. 306; *Re Cowley*; *Souch v. Cowley*, 53 L. T. 494; *Re Oliver*; *Newbald v. Beckitt*, 62 L. T. 533. Condition and trust.

2. In some cases a condition apparently precedent has been read as forming part of the original limitation. Thus, a devise to M. and the heirs of her body, on condition that she marry and have issue male by S., was held to give an estate in special tail to M. *Page v. Hayward*, 2 Salk. 570. Condition and limitation.

Similarly, an estate to arise upon a condition which cuts down a previous estate will, if possible, be construed as a remainder by looking upon the condition as forming part of the limitation of the previous estate. Thus, a devise to A. for life if she should not marry again, but if she should, to B., will be construed as a devise to A. for life or till marriage. *Luxford v. Cheeke*, 3 Lev. 125; *Lady Ann Fry's Case*, 1 Ventr. 203; *Gordon v. Adolphus*, 3 B. P. C. 306.

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Devise for life  
subject to a  
proviso.

So, too, if the gift for life is made "subject to the proviso hereinafter contained," the proviso is incorporated into the original limitation. *Webb v. Grace*, 2 Ph. 701.

And a bequest to A. for life, if she should so long remain unmarried, will be construed in the same way. *Heath v. Lewis*, 3 D. M. & G. 954; *In re Moore*; *Trafford v. Maconochie*, 39 Ch. D. 116.

On the other hand, if the condition is so penned that it cannot be connected with the previous limitation for life, it must take effect as a condition. *Sheffield v. Lord Orrery*, 3 Atk. 282; see *Allen v. Jackson*, 1 Ch. D. 399.

In such a case, however, it may appear that the original estate was only meant to last till the condition takes effect, if, for instance, the rents are directed to be paid to a woman, which could only be done till her marriage, the estate not being given to her separate use. *Meeds v. Wood*, 19 B. 215.

Estate of  
trustees to  
preserve.

Upon the same principle, the ordinary limitation to trustees to preserve contingent remainders is a vested remainder, the prior estate being looked upon as lasting till forfeiture by the prior taker. *Smith d. Dormer v. Parkhurst*, 18 Viner, fol. 413; 7 Mad. 366; 3 Atk. 135; 4 B. P. C. 353; *Fearne*, C. R. 333.

### CHARACTERISTICS OF CONDITIONS PRECEDENT.

General test  
of condition  
precedent.

Whether a condition is subsequent or precedent must depend on the language in which it is framed, and very little help can be derived from decided cases on the point. It may, however, be noticed, that when the condition requires something to be done, which will take time, the argument is in favour of construing it as a condition subsequent. *Popham v. Bampffield*, 1 Vern. 79; 1 Eq. Ab. 108, pl. 2; *Peyton v. Bury*, 2 P. W. 626; *Duddy v. Gresham*, 2 L. R. Ir. 443.

On the other hand, a condition, which involves anything in the nature of consideration, is in general a condition precedent. *Acherley v. Vernon*, Willes, 153; *In re Wellstead*, 25 B. 612; *Fitzgerald v. Ryan*, (1899) 2 Ir. 637.

Condition  
precedent  
whether  
impossible,

If a devise be made to take effect only on performance of some particular duty by the devisee, or upon some particular event, there is no gift unless the condition is fulfilled. And



it makes no difference that the event is impossible in its creation, as to go to Rome in three days, or impolitic, or illegal. See Co. Litt. 206b; Shep. Touchstone, p. 132; *Egerton v. Earl Brownlow*, 4 H. L. 1; *Priestley v. Holgate*, 8 K. & J. 286; *Caldwell v. Cresswell*, 6 Ch. 278.

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impolitic, or illegal, must be fulfilled in the case of realty.

But as regards personalty, a gift made upon a condition precedent involving a physical impossibility, such as to drink up the ocean, takes effect, notwithstanding the condition. See 1 Swin., Part IV., sec. 6, p. 257; Co. Litt. 206b.

In personalty condition precedent involving a physical impossibility is invalid.

But if the condition precedent, though in fact impossible at the date of the will, or becoming impossible by subsequent events, involves no physical impossibility, the gift will not take effect. *Lowther v. Cavendish*, 1 Ed. 99, 116; 3 B. P. C. 186; *Robinson v. Wheelwright*, 21 B. 214; 6 D. M. & G. 535.

As regards personalty, a condition precedent which becomes impossible by the act of the testator is discharged; for instance, a gift of rents of leaseholds to A. if she should choose to reside at Battens when the testator sells Battens, or a gift to A. if he repays the debt he owes me, when the testator afterwards accepts a composition and releases the debt. *Darley v. Langworthy*, 3 B. P. C. 359; *Gath v. Barton*, 1 B. 478; *Walker v. Walker*, 2 D. F. & J. 255.

Condition discharged by testator.

It is said that as regards personalty a condition precedent which is *contra bonos mores*, for instance, a gift to A. if she should live apart from her husband may be rejected, leaving the gift absolute, and there is some not very satisfactory authority in support of the proposition. *Brown v. Peck*, 1 Ed. 140; *Wren v. Bradley*, 2 De G. & S. 49. See 39 Ch. D. 116.

Condition precedent *contra bonos mores*.

On the other hand, a gift to A. if living with his wife, and if not, half to him and half to her, is valid. *Shewell v. Dwaris*, Jo. 172.

A gift to A. if he does not marry under a certain age, or if he marries B., does not vest unless the condition is performed and the consent of the testator to a marriage under that age, or to a marriage with C., does not alter the case. *Yonge v. Furze*, 8 D. M. & G. 756; *Davis v. Angel*, 4 D. F. & J. 524. See *Smith v. Cowdery*, 2 S. & St. 358.

Condition precedent as to marriage.

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Marriage  
with consent.

With regard to a condition precedent requiring marriage with consent, it seems that the consent may be disregarded if there is no gift over. *Reeves v. Herne*, 5 Vin. Ab. 343, pl. 41; *Reynish v. Martin*, 3 Atk. 330; see *Clarke v. Parker*, 19 Ves. 1.

But the consent only, and not the marriage, can be dispensed with; the legacy, therefore, will not vest till marriage. *Garbut v. Hilton*, 1 Atk. 381; *Gray v. Gray*, 23 L. R. Ir. 400.

On the other hand, if there is a gift over, marriage without consent will not vest the legacy. *Harry v. Aston*, Com. 726; *Malcolm v. O'Callaghan*, 2 Mad. 349; revd. on other grounds, Coop. t. Brougham, 73; *Gardiner v. Slater*, 25 B. 509.

And if the consent required is to a marriage under a certain age the condition must be complied with. *Stackpole v. Beaumont*, 3 Ves. 89; see *Gray v. Gray*, 23 L. R. Ir. 399.

And the condition must also be complied with if the legatee is provided for as well in the case of marriage without as in the case of marriage with consent. *Creagh v. Wilson*, 2 Vern. 572; *Gillett v. Wray*, 1 P. W. 284; *Holmes v. Lysaght*, 2 B. P. C. 261; *In re Nourse*; *Hampton v. Nourse*, (1899) 1 Ch. 63.

Consent of the  
testator to a  
marriage in  
his lifetime  
satisfies a  
condition  
requiring  
consent.

Where the condition is marriage with consent, whether precedent or subsequent, the consent of the testator to a marriage in his lifetime satisfies the condition. *Clarke v. Berkeley*, 2 Vern. 720; *Parnell v. Lyon*, 1 V. & B. 479; *Wheeler v. Warner*, 1 S. & St. 304; *Tweedale v. Tweedale*, 7 Ch. D. 633; see *Violet v. Brookman*, 5 W. R. 342.

And the condition does not apply to a subsequent marriage. *Hutcheson v. Hammond*, 3 B. C. C. 128; *Crommelin v. Crommelin*, 3 Ves. 227.

Consent of  
testator to a  
marriage to  
take place  
after his  
death.

But in such a case the consent of a testator to a marriage to take place after his death does not obviate the necessity for the consent of the persons named in the will. *Lowry v. Pattison*, 1 R. 8 Eq. 372.

Condition of  
marriage with  
consent is  
satisfied by  
a second  
marriage with  
consent.

It seems, that where there is a gift upon marriage with consent, the legatee has her whole life to perform the condition and the legacy is not forfeited by a first marriage without consent. *Randall v. Payne*, 1 B. C. C. 55; *Beaumont v. Squire*, 17 Q. B. 905. *Clifford v. Beaumont*, 4 Russ. 325, was decided

on the ground, that the gift was only upon a marriage with consent, which had not in fact been obtained. See, too, *Duddy v. Gresham*, 2 L. R. Ir. 448. Chap. XXXV.

But if other provision is made for the legatee in the event of marriage without consent, the condition must be limited to a first marriage. *Lowe v. Manners*, 5 B. & Ald. 917.

In the case of a condition requiring the consent of several persons, if the consent required is that of executors or trustees, the consent of those who renounce or do not act is not necessary. *Worthington v. Evans*, 1 S. & St. 165; *Boyce v. Corbally*, Ll. & G. t. Plunkett, 102; *Ewens v. Addison*, 4 Jur. N. S. 1084; *White v. M'Dermot*, I. R. 7 C. L. 1; see *Clarke v. Parker*, 19 Ves. 1. Condition requiring the consent of several persons, how performed.

But if there is only a single executor who renounces, his consent must, it seems, be obtained. *Graydon v. Hicks*, 2 Atk. 16; but the case is doubtful.

And a condition requiring the consent of several persons is performed by obtaining the consent of the survivors. *Ewing v. Anderson*, 7 W. R. 23; *Dawson v. Oliver Massey*, 2 Ch. D. 753.

If the consent of guardians is required, guardians must be appointed if there are none. *In re Brown's Trusts*, 18 Ch. D. 61.

If the testator imposes his own consent to a marriage as a condition, this will, if possible upon the construction of the will, be limited to a marriage before his death. *Booth v. Meyer*, 38 L. T. 125; *Curran v. Corbet*, (1897) 1 Ir. 348. Testator's consent.

Where the testator does not prescribe any formalities, it is enough if the consent is substantially given. *Daley v. Desbouverie*, 2 Atk. 261; *In re Smith*; *Keeling v. Smith*, 44 Ch. D. 654.

#### VESTING OF REAL ESTATE.

It has sometimes been said that the Court leans in favour of early vesting: see per Best, C.J., *Duffield v. Duffield*, 3 Bl. N. S. p. 381; 1 D. & C. 311. According to the modern doctrine, however, the Court has no leaning. It construes the will fairly, and gives effect to the intention expressed without any preconception as to what the testator ought to have or has Court leans in favour of vesting.

Chap. XXXV. intended, subject only to this, that it may be bound by rules established by the early authorities, though it might not now adopt such rules if the matter were at large.

Devise  
"when" or  
"if" is con-  
tingent.

A devise to A. and his heirs "if" or "when" he attains twenty-one is contingent according to the opinion of Fearn, Post. Works, 191. So, too, "a devise in remainder to a class of children if they attain twenty-one is a contingent remainder. It is also a contingent remainder if it be a devise to a class of children equally at the age of twenty-one. And so also it is a contingent remainder if it be a devise in remainder to children who shall attain the age of twenty-one." Per Stuart, V.-C., in *Browne v. Browne*, 3 Sm. & G. 587; *Alexander v. Alexander*, 16 C. B. 59; *Love v. Love*, 7 L. R. Ir. 306; see *Jull v. Jacobs*, 3 Ch. D. 708.

Condition  
requiring the  
attainment of  
a certain age  
may some-  
times be  
subsequent.

Cases, however, where the condition as to attaining a certain age forms part of the original devise, must be distinguished from those cases where the condition is contained in a separate direction; thus, where there is a trust for A. and to be conveyed when he attains twenty-three, or an immediate devise followed by a clause directing that the devisee "is not to be of age to receive this" till he attains a certain age, or that it is to become his property on attaining twenty-five, the devisee has taken a vested interest subject to be divested. *Pearl v. Kekewich*, 15 B. 166; *Snow v. Poulden*, 1 Kee. 186; *Attwater v. Attwater*, 18 B. 330.

So, too, a devise to A., provided she lives to attain twenty-one, has been held vested subject to be divested. *Simmonds v. Cock*, 29 B. 455, where the devise was after a life estate.

Effect of  
words "from  
and after"  
death of A.

A devise to A. for life and "from and after" his death to B. if he attains twenty-one gives B. a contingent estate, though slight circumstances may be sufficient to show that his estate was to be vested. *Andrew v. Andrew*, 1 Ch. D. 410; *In re Jobson*; *Jobson v. Richardson*, 44 Ch. D. 154.

Express direc-  
tion as to  
vesting.

When there is an express direction as to the time of vesting, nothing can vest before the appointed time; though on the other hand the question of vesting is not affected by a direction merely referring to the period of possession. *Russell v.*

*Buchanan*, 2 Cr. & M. 561; 7 Sim. 628; *Montgomerie v. Woodley*, 5 Ves. 522; *Shrimpton v. Shrimpton*, 31 B. 425. Chap. XXXV.

A devise to A. at or when or if he attain twenty-one will be vested:—

Cases in which a devise to A. at or when or if he attain 21 is vested.

1. If an estate is given prior to the attainment of twenty-one by the ultimate devisee to some third person either for the benefit of the devisee himself, or for the benefit of some other persons to endure during the minority. *Goodtitle d. Hayward v. Whitby*, 1 Burr. 228; *Re Mottram*, 10 Jur. N. S. 915; *Boraston's Case*, 3 Rep. 19a; *Manfield v. Dugard*, 1 Eq. Ab. 195, pl. 4. Prior devise till A. attain 21.

In this case the estate given to the devisee on attaining twenty-one is in fact a vested interest subject to a term.

2. If there is a gift over upon death under twenty-one, the gift over shows that the first devisee is to take whatever interest the person claiming under the devise over is not entitled to, that is to say, the immediate interest. *Bromfield v. Crowder*, 1 B. & P. N. R. 318; see 14 East, 604; *Doe d. Roake v. Newell*, 1 Mau. & S. 327; 5 Dow, 202; *Edwards v. Hammond*, 3 Lev. 132; *Doe d. Hunt v. Moore*, 14 East, 601; *Phipps v. Ackers*, 3 Cl. & Fin. 691; 9 *ib.* 583; *Whitter v. Bremridge*, L. R. 2 Eq. 736; see *L'Estrange v. L'Estrange*, 25 L. R. Ir. 399. Gift over upon death under 21.

This principle was applied to a devise to A. for life and then to B. if living at A.'s death, and if B. should die before A. without leaving issue surviving over. *Finch v. Lane*, 10 Eq. 501.

But it has not been applied to a devise to A. for life and then to B. if she should survive A., but not otherwise, and if she should die before A. over, or to a similar devise after A.'s death to the children of B. if he leave any heirs surviving, and if none over. *Doe d. Planner v. Scudamore*, 2 B. & P. 289; *Price v. Hall*, 5 Eq. 399.

And the gift over can have no effect where there is an express direction as to the time of vesting. *Russell v. Buchanan*, 2 Cr. & Mee. 561; 7 Sim. 628.

3. There is an important distinction between a devise to definite persons or to a class, at twenty-one, and a devise to

Devise to a contingent class and to a

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class upon a  
contingency.

such of a class as attain twenty-one, or to those who attain twenty-one. In the latter case "the finding or not finding the legatee depends on his attaining a particular qualification, and till the contingency happens, there is no one to whom the doctrine laid down in *Phipps v. Ackers* can apply." Such a devise, therefore, will not be vested by a gift over. *Duffield v. Duffield*, 3 Bl. N. S. 260; *Stephen v. Stephen*, Ca. t. Talb. 228; *Festing v. Allen*, 12 M. & W. 279; *Holmes v. Prescott*, 10 Jur. N. S. 507; 33 L. J. Ch. 264; 11 L. T. N. S. 38; 12 W. R. 636; 3 N. R. 559; *Rhodes v. Whitehead*, 2 Dr. & Sm. 532; 13 W. R. 800; *Price v. Hall*, 5 Eq. 399; *Eddels' Trusts*, 11 Eq. 559; *Patching v. Barnett*, 28 W. R. 886; 51 L. J. Ch. 74. *Riley v. Garnett*, 3 De G. & S. 629; *Browne v. Browne*, 3 Sm. & G. 568, are overruled upon this point.

But a devise to A. for life, and if he leave a son born or to be born in due time after his decease, who should live to attain twenty-one, then to such son in fee if he attain twenty-one, with a gift over if A. die without leaving a son who should attain twenty-one, has been held to give an infant son of A. a vested estate subject to be divested, because a son born within nine months of A.'s death could not then have attained twenty-one. *Muskett v. Eaton*, 1 Ch. D. 435; see, too, *Doe v. Hopkinson*, 5 Q. B. 223; *Sulley v. Barber*, 59 L. T. 824.

An estate to  
commence in  
certain events  
fails unless  
the events  
happen.

4. An estate limited to commence in certain specified events will fail altogether unless those exact events happen. Thus a gift, "if A. shall die, living my wife, without leaving a widow or any child, after his death and my wife's" to B., will fail if A. survives the testator's wife, though he may die without leaving a widow or child. *Holmes v. Cradock*, 3 Ves. 317; *Shuldham v. Smith*, 6 Dow, 22; *Dicken v. Clarke*, 2 Y. & C. Ex. 572.

So if a testator recites that he will be entitled to property in certain events, and disposes of it, if those events happen, the property passes only if those events happen, though in fact, he may be entitled to the property in other events as well. *Archbold v. Austin Gourlay*, 5 L. R. Ir. 214.

Where the  
contingency  
imports no  
more than the

But in the case of successive limitations "where there is a limitation over which, though expressed in the form of a contingent limitation, is in fact dependent on a condition

essential to the determination of the interests previously limited, notwithstanding the words in form import contingency, they mean no more in fact than that the person to take under the limitation over is to take subject to the interests previously limited." *Maddison v. Chapman*, 4 K. & J. 709, 719; 3 De G. & J. 536; *Webb v. Hearing*, Cro. Jac. 415; *Pearsall v. Simpson*, 15 Ves. 29; *Franks v. Price*, 3 B. 182; 5 Bing. N. C. 37; 6 Sc. 710; *Chellen v. Martin*, 21 W. R. 671; *Edgeworth v. Edgeworth*, L. R. 4 H. L. 35; see *post*, p. 502.

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determination of prior interests the estate is vested.

Thus, if the devise is to A. for life, remainder to B. for life and on the decease of B., if A. be dead, to C. in fee, C. takes a vested remainder whether B. survives A. or not. Cases, *supra*; see, too, *Key v. Key*, 4 D. M. & G. 73; *In re Betty Smith's Trusts*, L. R. 1 Eq. 79; *In re Martin*; *Smith v. Martin*, 54 L. J. Ch. 1071; 53 L. T. 34.

So a devise in remainder to a person for his life, if he shall be living when the prior limitations determine, is not contingent, nor will subsequent remainders be contingent upon the survivorship of the tenant for life. *Leadbeater v. Cross*, 2 Q. B. D. 18.

But to admit this construction, the limitation over must involve no incident, but what is essential to the determination of the estates previously limited. *Maddison v. Chapman*, 4 K. & J. 709; 3 De G. & J. 536.

Limits of the doctrine.

5. If the property devised is a reversion which comes into possession only after the failure of issue of some person, a devise of such reversion after failure of the issue in question is in effect an immediate devise of the reversion. And the result is the same if the event upon which the reversion is expressed to be devised is larger than and includes the event upon which it comes into possession, if in effect the two events are the same, and the intention is merely to devise the reversion. If, for instance, the reversion falls into possession on failure of issue by a particular wife of the testator and the testator devises it upon a general failure of issue. The birth of issue by a second marriage would revoke the will. *Jones v. Morgan*, *Fearne*, C. R. App. 577; 3 B. P. C. 322; *Lytton v.*

Devise on a general failure of issue of a reversion dependent on failure of certain lines of issue.

Chap. XXXV. *Lytton*, 4 B. C. C. 441 ; see *Bankes v. Holme*, 1 Russ. 394, n. ; not approved, *ib.* 406 ; *Lewis v. Templer*, 33 B. 625.

But a mere devise of a reversion upon a failure of a larger class of issue than that upon which it is limited, will not operate as an immediate devise of the reversion. *Lady Lanesborough v. For*, Ca. t. Talb. 262.

Devise in  
default  
of issue.

6. It is well settled that a limitation in default or for want "of such issue," following a limitation in tail, is to be construed as a remainder to take effect upon the determination of the prior estate tail. It is not defeated by the birth of issue capable of taking under the prior limitation. *Ashley v. Ashley*, 6 Sim. 356.

And this construction may be applied where after a gift to A. for life with remainder to his first and other sons in tail, there is gift over in default of such sons, if there is any context to assist the construction. *Doe v. Dacre*, 1 B. & P. 250 ; 8 T. R. 112 ; *Hennessey v. Bray*, 33 B. 96.

Estates to  
arise upon  
the deter-  
mination of a  
prior life  
estate by  
marriage or  
bankruptcy  
take effect as  
vested  
remainders.

7. It is also settled, that when there is a gift to a person for life, if she so long remains unmarried, or for life until bankruptcy, followed by a gift over in the event of marriage or bankruptcy, the remainder is not contingent, but vested so as to take effect either upon the death or marriage or bankruptcy, as the case may be, of the tenant for life. *Luxford v. Cheeke*, 3 Lev. 125 ; *Lady Ann Fry's Case*, 1 Vent. 199 ; *Gordon v. Adolphus*, 3 B. P. C. 306 ; *Foster v. Lord Romney*, 11 East, 594 ; *Meeds v. Wood*, 19 B. 215 ; *Browne v. Hammond*, Jo. 210 ; *Walpole v. Laslett*, 7 L. T. N. S. 526 ; 1 N. R. 180 ; *Etches v. Etches*, 3 Dr. 441 ; *Underhill v. Roden*, 2 Ch. D. 494 ; *In re Cane* ; *Ruff v. Sirers*, 60 L. J. Ch. 36 ; 63 L. T. 746.

Gift till mar-  
riage followed  
by gift after  
death.

Similarly, where there is a gift for life or until marriage, followed by a gift over on death, the gift over takes effect on the marriage of the tenant for life. *Stanford v. Stanford*, 34 Ch. D. 362 ; *In re Dear* ; *Helby v. Dear*, 58 L. J. Ch. 659 ; 61 L. T. 492 ; 38 W. R. 31 ; *In re Akeroyd's Settlement* ; *Roberts v. Akeroyd*, (1898) 3 Ch. 363. *Re Wyatt* ; *Gowan v. Wyatt*, 60 L. T. 920, must be considered overruled.

Gift over to  
class living  
at death of  
tenant for life.

The fact that the gift over is to a class described as living at the death of the tenant for life does not prevent the



application of the rule. In such a case, upon the marriage of the tenant for life, the gift takes effect, and the class then living are entitled. *Bainbridge v. Cream*, 16 B. 25; *Stanford v. Stanford*, 34 Ch. D. 362. Chap. XXXV.

The fact that the testator gives to the person upon whose marriage the fund is given over a life interest in part does not prevent the application of the rule. *Scarborough v. Scarborough*, 57 L. T. 851. See, too, *Eaton v. Hewitt*, 2 Dr. & Sm. 184; *Wardroper v. Cutfield*, 33 L. J. Ch. 605; 12 W. R. 458; 10 L. T. 19, where, however, the contingency of marriage was held not to apply to the limitations under which the question arose. Tenant for life also beneficiary under gift over.

In *Pile v. Salter*, 5 Sim. 411, the testator gave his property to his widow as long as she should remain a widow, but upon her marrying again he gave her one third of all his property, and gave the other two thirds to his nieces. The widow died unmarried, and it was held there was an intestacy. The case has been disapproved (see *Underhill v. Roden*, 2 Ch. D. 491; *Scarborough v. Scarborough*, 58 L. T. 851); but it is obviously a long way from *Luxford v. Cheeke* and the other authorities of that class. Pile v. Salter.

The doctrine does not apply where a life interest is given in the first instance, which is then cut down by a gift over in the event of marriage. *Sheffield v. Lord Orrery*, 3 Atk. 282. Limits of doctrine.

And if the true construction is that there is an absolute gift to A., followed by a gift over if she marries, the gift over only takes effect in that event. *M'Culloch v. M'Culloch*, 3 Giff. 606.

Nor does the doctrine apply to a case where a residue is given to the testator's widow for life or until marriage, and an annuity is given to her if she marries again, and legacies are directed to be paid on her death. In such a case the legacies are not raisable on A.'s marriage. *In re Tredwell*; *Jeffray v. Tredwell*, (1891) 2 Ch. 640.

8. Upon principles resembling those above stated, a devise to a wife provided she should remain a widow, but in case she marries again to A. when he attains twenty-three, was held to give the widow who married again an interest till A. attained Doe v. Freeman.

**Chap. XXXV.** twenty-three. *Doe v. Freeman*, 1 T. R. 389 ; 2 Chitty, 498 ; *Re Cabburn* ; *Gage v. Rutland*, 46 L. T. 848.

Whether a contingency runs through a whole series of limitations.

9. When a particular estate is limited upon a contingency, and the subsequent estates are limited as remainders upon it, the contingency *primâ facie* applies to the whole series of limitations. *Davis v. Norton*, 2 P. W. 890 ; *Doe d. Watson v. Shippard*, Dougl. 75 ; *Tolderry v. Colt*, 1 Y. & C. Ex. 240, 627 ; 1 M. & W. 250.

Similarly, when an interest is given to a person, and then in a certain event a different interest is given with limitations over, the contingency applies to all the subsequent limitations. *Gray v. Golding*, 6 Jur. N. S. 474 ; *Cuttley v. Vincent*, 15 B. 198 ; *Findon v. Findon*, 24 B. 83 ; *Lett v. Randall*, 10 Sim. 112 ; *Paylor v. Pegg*, 24 B. 105.

Cases where the subsequent limitations are independent gifts.

On the other hand, if the subsequent limitations, or any of them, can be looked upon as independent gifts, they will not be liable to the contingency of preceding gifts. *Lethieullier v. Tracy*, 3 Atk. 774 ; Amb. 204 ; *Boosey v. Gardener*, 5 D. M. & G. 122 ; *Doutty v. Laver*, 14 Jur. 188 ; *Partridge v. Foster*, 35 B. 545 ; *In re Blight* ; *Blight v. Hartnoll*, 18 Ch. D. 858.

In the same way, if a particular gift is expressed to be made contingent from motives applicable to that gift only, subsequent gifts will not be contingent. *Horton v. Whittaker*, 1 T. R. 346.

Subsequent gifts subject to prior contingent gifts.

And if subsequent gifts can be read as given, subject to the prior limitations, they will not be liable to the contingencies of prior gifts. *Sheffield v. Earl of Coventry*, 2 D. M. & G. 551 ; see *Pearson v. Rutter*, 3 D. M. & G. 398 ; 6 H. L. 61 ; *Hole v. Davies*, 34 B. 345.

Where the ultimate limitation sums up the prior contingencies.

In the same way, when there has been a gift in one event to one set of issue in fee, and upon another event to another set of issue in tail, a gift over in default of such issue may be construed as referring to a failure of all the prior limitations, and not merely as a remainder dependent upon the limitations to the second class of issue taking effect. *Doe d. Lees v. Ford*, 2 E. & B. 970.

Whether an ultimate limitation applies

As to whether in a devise of Whiteacre to A. and his issue, and then to B. and his issue, and of Blackacre to B. and his

issue, and then to A. and his issue, and in default of issue of A. and B. over, the ultimate gift includes both estates. See *Gordon v. Gordon*, L. R. 5 H. L. 254; see, too, *Adshead v. Willetts*, 29 B. 358.

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to the whole of property which has been given in two independent lines.

VESTING OF CHARGES ON LAND.

The vesting of legacies charged upon real estate is governed by rules derived from the common law.

Legacies charged on land do not vest before they are payable.

“If a sum of money be given to a person charged upon real estate, and that person, being an infant, is not to have the legacy immediately, but it is given at twenty-one or payable at twenty-one, if the child does not attain twenty-one the legacy is not raisable.” *Parker v. Hodgson*, 1 Dr. & Sm. 568; see *Brown v. Wooler*, 2 Y. & C. C. 134.

In such a case the gift of interest in the meantime will not vest the legacy. *Gawler v. Standerwick*, 2 Cox, 15; see *Murkin v. Phillipson*, 3 M. & K. 257.

If the payment is postponed for purposes not referable to the person of the legatee, but only for the convenience of the estate, as, for instance, in the case of a life tenancy, the legacies vest before the time of payment. *Evans v. Scott*, 1 H. L. 57; *King v. Withers*, Ca. t. Talb. 116; *Haverty v. Curtis*, (1895) 1 Ir. 23; see *In re Brabazon*, 13 Ir. Eq. 156; *In re Neary's Estate*, 7 L. R. Ir. 311.

Distinction between postponement of payment for the purposes of the estate and of the legatee.

It makes no difference, whether the legacies subject to a life interest are made payable at twenty-one or not, though it seems that they will not in any case vest before then. *Remnant v. Hood*, 2 D. F. & J. 396; *Davies v. Huguenin*, 1 H. & M. 730; *Haverty v. Curtis*, (1895) 1 Ir. 23.

And a legacy charged upon land and directed to be paid upon an event which may or may not happen, for instance, when the testator's eldest son should come into possession of a settled estate, will fail if the event does not happen. *Taylor v. Lambert*, 2 Ch. D. 177.

Legacy payable upon an event which may never happen is contingent.

If a legacy is charged upon real and personal estate, the personal estate is the primary fund for payment, and, so far as the personal estate extends, the vesting is governed by the rules applicable to personal estate, but, so far as the legacy is

Legacy charged upon real and personal estate follows proportionally.

**Chap. XXXV.** payable out of realty, the rules with regard to legacies charged upon land apply. *Duke of Chandos v. Talbot*, 2 P. W. 601, 612; *Prowse v. Abingdon*, 1 Atk. 481; *In re Hudsons*, Dru. t. Sugd. 6.

the rules applicable to realty and personalty.

In the case of a power, if the donee is authorised to fix the times at which portions are to vest, he can direct a portion to vest at once, and it will in that case be raisable though the child dies under twenty-one. *Henty v. Wrey*, 21 Ch. D. 332, where the subject of the vesting of portions is fully discussed.

#### VESTING OF BEQUESTS OF PERSONALTY.

Vesting of personalty is governed by the civil law.

The vesting of bequests of personalty, including chattels real, is governed by rules derived from the civil law. These rules also apply to realty directed to be converted. *In re Hudsons*, Dru. t. Sugd. 6; *In re Hart's Trusts*, 3 De G. & J. 195.

Meaning of "vest."

I. When there is an express direction as to the period of vesting:—

It has been said that the word "vest," being derived from "vestire," naturally refers to vesting in possession, and not to vesting in interest. *Young v. Robertson*, 4 Macq. 314. This is, however, contrary to the whole current of English authority, according to which the word "vest" has always been held to refer *primâ facie* to vesting in interest or transmissibility, and not vesting in possession or indefeasibility.

Direction as to vesting is imperative.

Thus, when there is a direction that the gifts are to be vested at a certain period, the legatee will take no interest till then.

Gift over upon death before the time of vesting will not alter the meaning of the word vest.

Where the interests of legatees are to be vested at twenty-one, a gift over upon death under twenty-one, or upon death before the time of vesting, will not affect the natural meaning of the word. *Glanvill v. Glanvill*, 2 Mer. 38; *Comport v. Austen*, 12 Sim. 218; *Griffith v. Blunt*, 4 B. 248; *Rowland v. Tawney*, 26 B. 67; *Re Thatcher's Trust*, *ib.* 365; *Wakefield v. Dyott*, 7 W. R. 31; 4 Jur. N. S. 1098; *Selby v. Whittaker*, 6 Ch. D. 239; see *Creeth v. Wilson*, 9 L. R. Ir. 216.

When "vested" means "payable."

In many cases, however, "vested" has been used as equivalent to indefeasible or payable.

Thus, if the shares of members of a class are directed to be vested at a certain time, and there is a gift over to the other members of the class of the shares of those dying before that time without issue, vested will mean payable. *Taylor v. Frobisher*, 5 De G. & S. 191.

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Gift over upon death without issue before the time of vesting.

So, too, if legatees are treated as taking vested shares before the time fixed for vesting, vested must mean payable.

Shares treated as vested before the time appointed.

This will be the case, if a time is appointed for vesting, and maintenance is given, if any child entitled on the death of the tenant for life to a vested or presumptive share should be under the age appointed for vesting, where the word presumptive refers to the possibility of accruer. *Berkeley v. Scrinburne*, 16 Sim. 275; *Baxter's Trust*, 4 N. R. 131; 10 Jur. N. S. 485.

Similarly, if in the event of any child dying before the time of vesting, leaving children, there is a gift of the share such child would have had if living to his issue, the direction as to vesting will be referred to payment. *In re Edmondson's Estate*, 5 Eq. 389; *Poole v. Bott*, 11 Ha. 33.

Or, again, it may appear that the testator has used the terms vested and paid interchangeably. *In re Edmondson's Estate*, *supra*; *Williams v. Haythorne*, 6 Ch. 782; *Re Parr's Trust*, 41 L. J. Ch. 170; *Darley v. Percival*, (1900) 1 Ir. 145.

Vested and paid used interchangeably.

And when there is a direction to pay legacies at the death of the tenant for life, a subsequent direction as to vesting at twenty-one will be referred to indefeasible vesting or possession. *Barnet v. Barnet*, 29 B. 239; *Simpson v. Peach*, 16 Eq. 209.

Direction to pay legacies at a certain time.

When there is a gift to children who survive their parent, a direction as to vesting will not make the gift vest in any who do not survive their parent. *In re Payne*, 25 B. 556; *Williams v. Haythorne*, 6 Ch. 782; see *Draycott v. Wood*, 5 W. R. 158.

Gift to children who survive the parent with a direction as to vesting.

If, however, the proviso as to vesting is intended to introduce a new gift, evidenced by the fact, for instance, that it applies to prior legatees who die leaving issue, and not merely to such of them as survive the tenant for life, it will override the previous contingency of surviving the tenants for life. *Williams v. Russell*, 10 Jur. N. S. 168.

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Beneficial  
interest.

A direction that legatees are to be beneficially interested at a certain period, refers only to vesting in possession. *M'Lachlan v. Taitt*, 28 B. 407 ; 2 D. F. & J. 449.

## II. Where there is no direction as to vesting:—

Gift to a class  
who attain 21,  
and to a class  
at 21.

1. It is important to distinguish a gift to a contingent class, and a gift to a class upon a contingency; thus, a gift to children who attain twenty-one, or to such children as attain twenty-one, is a gift to a contingent class, and will only vest in those who attain twenty-one, though there may be a gift of interest or other circumstances, which in a gift to a class upon a contingency, as, for instance, at twenty-one, might have the effect of vesting the bequest. *Bull v. Pritchard*, 1 Russ. 213 ; *Bree v. Perfect*, 1 Coll. 128 ; *Leake v. Robinson*, 2 Mer. 363 ; *Stead v. Platt*, 18 B. 50 ; *Lloyd v. Lloyd*, 3 K. & J. 20 ; *Thomas v. Wilberforce*, 31 B. 299 ; *Williams v. Haythorne*, 6 Ch. 782 ; *Deuar v. Brooke*, 14 Ch. D. 529 ; *Wilson v. Knox*, 13 L. R. Ir. 349 ; see *Re Bulley's Estate*, 11 Jur. N. S. 791, 847 ; *Gotch v. Foster*, 5 Eq. 811.

Contingency  
not imported  
into the gift  
to a single  
child.

If the gift is to children who attain twenty-one, and, if but one child, to such child, the contingency of attaining twenty-one will not be imported into the gift to a single child, unless it is apparent from the gift over, for instance, by a gift over "if no child shall live to attain a vested interest," or otherwise that no child was intended to take a vested interest at birth. *Walker v. Mower*, 16 B. 365 ; *Johnson v. Foulds*, 5 Eq. 268 ; *Re Fletcher* ; *Doré v. Fletcher*, 53 L. T. 813.

Direction as  
to payment  
will not  
postpone  
vesting when  
there is a  
clear gift.

2. Where there is a clear gift, an additional direction to pay, when the legatee attains a given age, will not postpone the vesting, the gift being considered *debitum in presenti, solvendum in futuro*.

Thus, a gift to A., payable at twenty-one, is vested, and it makes no difference whether the gift precedes or follows the direction for payment, provided a clear immediate gift can be found in the will. *In re Bartholomew*, 1 Mac. & G. 354 ; *Shrimpton v. Shrimpton*, 31 B. 425 ; *Maher v. Maher*, 1 L. R. Ir. 22.

Where the  
only gift is  
in the direc-

The difficulty in these cases is to decide whether there is a substantive gift and a direction to pay, or whether the only

gift is in the direction to pay. See *Shum v. Hobbs*, 3 Dr. 93; *Chaffers v. Abell*, 3 Jur. 577; *Farmer v. Francis*, 2 S. & St. 505; *Williams v. Clark*, 4 De G. & S. 472; *Merry v. Hill*, 8 Eq. 619.

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tion to pay,  
nothing vests  
till then.

When there is a clear gift, a direction to accumulate the interest and to pay the principal and accumulations at twenty-one will not affect the vesting. *Stretch v. Watkins*, 1 Mad. 253; *Blease v. Burgh*, 2 B. 226; *Breedon v. Tugman*, 3 M. & K. 289.

Direction to  
accumulate  
interest till 21  
will not affect  
a gift already  
vested.

In doubtful cases the construction may be assisted by reference to other limitations; thus, where there was a gift for the children of a tenant for life, to be paid upon their attaining twenty-five, and if but one child, the whole to become the property of such only child, upon his attaining twenty-five, and be transmissible to his heirs, executors, or administrators, none of the children took vested interests before twenty-five, the gift, in the event of there being an only child, being clearly contingent. *Judd v. Judd*, 3 Sim. 525; see *Hunter v. Judd*, 4 Sim. 455; *Merry v. Hill*, 8 Eq. 619.

In doubtful  
cases the  
contingency  
may be  
reflected back  
and *vice versa*.

Similarly, if the interest of an only child is clearly vested, this may show that a gift to all the children at twenty-one was meant to be vested too. *King v. Isaacson*, 1 Sm. & G. 371.

And it may appear from the context that the words "to be paid" were meant to refer to vesting and not to payment. *Martineau v. Rogers*, 8 D. M. & G. 328.

Paid may  
mean vested.

3. The time when the legacy is to be paid must, however, be certain; that is to say, it must be certain that the time will come if the legatee lives long enough. No doubt it is uncertain whether a legatee will ever attain a given age, but since he must attain it if he lives, this latter contingency is disregarded.

Gift to be  
paid at a time  
which may  
never come in  
the legatee's  
life is  
contingent.

"When the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, I can find no instance in this Court where it has been held that the legacy at all events should be paid." It becomes, in fact, a legacy upon condition, for *dies incertus conditionem in testamento facit*. Thus, a legacy to A.

**Chap. XXXV.** to be paid upon marriage is contingent. *Atkins v. Hiccocks*, 1 Atk. 500; *Ellis v. Ellis*, 1 Sch. & L. 1; *Morgan v. Morgan*, 4 De G. & S. 164; *In re Cantillon's Minors*, 16 Ir. Ch. 301; *Corr v. Corr*, I. R. 7 Eq. 397; *Taylor v. Lambert*, 2 Ch. D. 177.

Gift upon marriage construed as a gift at 21, or upon marriage under 21.

It may be noticed, however, that a legacy given upon marriage may be held upon the context to be given at twenty-one, or upon marriage under twenty-one, as where there was a gift to parents for life, and then to their children if then of age or married, and if any were infants at the death of their parents, then to them at twenty-one, if sons, or on marriage if daughters. *Lang v. Pugh*, 1 Y. & C. C. 719; see *West v. West*, 4 Giff. 198.

4. When the only gift is to be found in the direction to pay or divide:—

Direction to pay after a life interest vests at once.

a. If the postponement of division or payment is merely on account of the position of the property, if, for instance, there is a prior gift for life, or a bequest to trustees to pay debts, and a direction to pay upon the decease of the legatee for life, or after payment of the debts, the gift in remainder vests at once. *Bennett's Trust*, 8 K. & J. 280; *Strother v. Dutton*, 1 De G. & J. 675.

Direction to pay at 21 will not vest till then.

b. But where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time.

Thus, a gift to a person at, or if, or as and when he shall attain, or upon attaining, or from and after attaining twenty-one, will not vest till the age is attained. *Hanson v. Graham*, 6 Ves. 289; *Locke v. Lamb*, 4 Eq. 372.

Gift to A. till B. attains 21, then to B.

Probably a gift of personalty to A. till B. attains twenty-one and then to B., will not give B. a vested interest unless there is something to show that A. is to take in trust for B. *Lane v. Goudge*, 9 Ves. 225; *Sullivan v. Edgell*, 23 W. R. 722.

5. Vesting of residuary and severed gifts:—

Residuary and severed gifts more easily vested.

If the subject-matter of the gift is residue (a), or if it is at once separated from the rest of the estate and vested in trustees for the benefit of the legatee (b), these are circumstances which assist the Court in arriving at the conclusion that the gift is vested. *Booth v. Booth*, 4 Ves. 399; *Pearman v. Pearman*, 33 B. 394 (a); *Love v. L'Estrange*, 5 B. P. C. 59; *Saunders v.*



*Vautier*, Cr. & Ph. 240; *Branstrom v. Wilkinson*, 7 Ves. 420; Chap. XXXV. *Greet v. Greet*, 5 B. 123; *Lister v. Bradley*, 1 Ha. 10; *Ingram v. Suckling*, 7 W. R. 386; *Pearson v. Dolman*, 3 Eq. 315; *In re Beran's Trusts*, 34 Ch. D. 716; *Brennan v. Brennan*, (1894) 1 Ir. 69; *In re Wrey*; *Stuart v. Wrey*, 30 Ch. D. 507 (b).

6. The effect of a gift of the interest in the meantime upon vesting:—

Gift of interest in meantime.

a. If the interest upon a legacy or share of residue is given to the legatee in the meantime till the time of payment arrives the gift is vested. *Hanson v. Graham*, 6 Ves. 239; *In re Hart's Trusts*, 3 De G. & J. 195; *Hardcastle v. Hardcastle*, 1 H. & M. 405; *Bell v. Cade*, 2 J. & H. 122; *Perrott v. Davies*, 38 L. T. 52; *Bolding v. Strugnell*, 24 W. R. 339; 45 L. J. Ch. 208.

This rule applies in the case of deeds. *Mostyn v. Brunton*, 17 Ir. Ch. 153.

The rule applies though the interest may be given subject to charges or annuities. *Lane v. Goudge*, 9 Ves. 225; *Jones v. Mackilwain*, 1 Russ. 220; *Potts v. Atherton*, 28 L. J. Ch. 486.

It applies though the interest may be expressed to be given for maintenance. *In re Hart's Trusts*, 3 De G. & J. 195; *In re Bunn*; *Isaacson v. Webster*, 16 Ch. D. 47; *Scotney v. Lomer*, 29 Ch. D. 535; 31 Ch. D. 380; *Brennan v. Brennan*, (1894) 1 Ir. 69.

It applies though the time when the principal is given is marriage, or a later age than twenty-one. *In re Peek's Trusts*, 16 Eq. 221; *In re Bunn*; *Isaacson v. Webster*, 16 Ch. D. 47; *In re Wrey*; *Stuart v. Wrey*, 30 Ch. D. 507; *Scotney v. Lomer*, 29 Ch. D. 535; 31 Ch. D. 380; see *Pearson v. Dolman*, 3 Eq. 315. *Batsford v. Kebbel*, 3 Ves. 363, would probably not now be followed. It may be distinguished from the cases above cited on the ground that the legacy was not separated and given to trustees.

b. There has been some difference of opinion whether power given to trustees to apply the whole or such part as they think fit of the income of a share in maintenance will vest the share. *Jessel, M.R.*, decided that it would. *Fox v. Fox*, 19 Eq. 236; see, too, *Eccles v. Birkett*, 4 De G. & S. 105; but in *In re Wintle*; *Tucker v. Wintle*, (1896) 2 Ch. 711,

Discretion to apply all or part of interest.

Chap. XXXV. North, J., arrived at a contrary conclusion. See also *Wilson v. Knox*, 13 L. R. Ir. 349.

*In re Grimsdew's Trusts*, 11 Ch. D. 406, is to the same effect. In *In re Turney; Turney v. Turney*, (1899) 2 Ch. 739, Lindley, M.R. and Jeune, P. approved *Fox v. Fox*, but there was no argument on the point.

Other cases of discretion.

A discretion either to apply the interest to maintenance or to accumulate it (a); or to apply the whole or part of the interest, not exceeding a fixed sum, to maintenance (b); or the gift of a fixed sum for maintenance, though it may be equivalent to the interest of the legacy (c); or the gift of a sum for maintenance out of the personal estate not exceeding the income of the legacies (d); or a discretion to apply the income for the benefit, of the legatees to the exclusion of any one or more of them (e); will have no effect upon vesting. *Vaudry v. Geddes*, 1 R. & M. 203 (a); *Merry v. Hill*, 8 Eq. 619 (b); *Boughton v. Boughton*, 1 H. L. 406; *Watson v. Hayes*, 5 M. & Cr. 125; *Livesey v. Livesey*, 3 Russ. 287 (c); *Wynch v. Wynch*, 1 Cox, 493; *Rudge v. Winnall*, 12 B. 357 (d); *In re Barnshaw's Trusts*, 15 W. R. 378 (e).

Effect of a gift of interest for a portion of the period before vesting.

c. Where interest is given only for a portion of the period before the time fixed for payment, if, for instance, legacies are given at twenty-six, with interest for maintenance during minority, it is doubtful whether the gift will be vested; probably it will not without more. See the remarks in *Pearson v. Dolman*, 3 Eq. 315. In *Davies v. Fisher*, 5 B. 201; *Harrison v. Grimwood*, 12 B. 192; *Tatham v. Vernon*, 29 B. 604, there were other circumstances. And see *Hunter's Trusts*, L. R. 1 Eq. 295.

It may be noticed, that minority properly means the period before the attainment of twenty-one; though, if there is an intention expressed to that effect, it may mean the whole period during which the testator has kept the legatee out of the property. *Milroy v. Milroy*, 14 Sim. 48; *Maddison v. Chapman*, 4 K. & J. 709; 3 De G. & J. 536; *Fraser v. Fraser*, 1 N. R. 430.

Gift of interest itself contingent.

d. Where the interest is not given in the meantime, but is itself given at the same time as the principal, the gift

does not vest. *Knight v. Knight*, 2 S. & St. 490; *Locke v. Lamb*, 4 Eq. 372. Chap. XXXV.

c. A distinction must be drawn between the gift of a sum to each member of a class at twenty-one, with a gift of the interest upon the several shares in the meantime, and the gift of an aggregate fund to a class as they respectively attain twenty-one, with a direction that the whole interest is to be applied for their maintenance in the meantime; in the latter case, as the fund is to be kept together, and the whole interest applied for maintenance, nothing will vest before twenty-one. *Pulsford v. Hunter*, 3 B. C. C. 416; *Barker v. Lea*, T. & R. 413; *In re Ashmore's Trusts*, 9 Eq. 99; *Spencer v. Wilson*, 16 Eq. 501; *In re Parker*; *Barker v. Barker*, 16 Ch. D. 44; *In re Morris*; *Salter v. A.-G.*, 33 W. R. 895; *Re Martin*; *Tuke v. Gilbert*, 57 L. T. 471; *In re Mervin*; *Mervin v. Crossman*, (1891) 3 Ch. 197; see *In re Byrne*, 23 L. R. Ir. 260; *In re Bevan's Trusts*, 34 Ch. D. 716.

Distinction between gift of interest upon a legacy to an individual and upon an aggregate fund given to a class.

7. An argument in favour of vesting has sometimes been based upon a power to make advances. *Virian v. Mills*, 1 B. 315; *Harrison v. Grimwood*, 12 B. 192; *Powis v. Burdett*, 9 Ves. 428; *Walker v. Simpson*, 1 K. & J. 713; see *Malden v. Maine*, 2 Jur. N. S. 206.

Arguments in favour of vesting.

8. Effect of a gift over upon vesting:—

a. Where the gift is to a class at twenty-one a gift over upon the death of members under twenty-one cannot it seems have any effect upon vesting. See, per Leach, V.-C., *Bland v. Williams*, 3 M. & K. 411.

Gift over on death under 21.

b. A gift over of the interests of members of the class dying under twenty-one to other members of the class vests the shares. The gift over would be superfluous if the interests are contingent on attaining twenty-one. *In re Edmondson's Estate*, 5 Eq. 389; see *Wetherell v. Wetherell*, 1 D. J. & S. 134; *In re Gunning's Estate*, 13 L. R. Ir. 203.

Gift to other members of class.

c. A gift over upon death of members of the class under twenty-one and without issue vests the gift. The gift over shows that the members were to take except in the event of death under twenty-one and without issue. *Harrison v. Grimwood*, 12 B. 192; *Murkin v. Phillipson*, 3 M. & K. 257;

Gift over on death under 21, coupled with other event.

Chap. XXXV. *Bland v. Williams*, *ib.* 411; *In re Thomson's Trusts*, 11 Eq. 146.

Gift over on death without issue.

*d.* A gift over upon death without issue simply, would not it seems vest the gift. *Barker v. Lea*, T. & R. 413.

Gift over if parent dies without issue.

*e.* Where the gift is to A. for life with remainder to her children at twenty-one, and if A. dies without leaving issue or without issue over, the gift over has no effect upon vesting. *In re Wrangham's Trusts*, 1 Dr. & Sm. 358; *Chadwick v. Greenall*, 3 Giff. 221; *Kidman v. Kidman*, 40 L. J. Ch. 359; see *Walker v. Mower*, 16 B. 365; *Ingram v. Suckling*, 7 W. R. 386.

But if the gift is to children living at A.'s death at twenty-one, with a gift over if A. die without leaving issue, the gift over vests the gift in children living at A.'s death whether they attain twenty-one or not. If it were contingent, if a child survived A., the gift over could not take effect, nor could the child take if it died under twenty-one. *Bree v. Perfect*, 1 Coll. 128; *In re Bevan's Trusts*, 34 Ch. D. 716.

#### 9. Vesting upon context generally:—

Reference to share.

In some cases where the gift was to a class upon their attaining a certain age a reference to "the share" of a member of the class dying before that age has been held to show that the members of the class took vested interests at birth. *In re Turney*; *Turney v. Turney*, (1899) 2 Ch. 739; see *Virian v. Mills*, 1 B. 315.

General context.

There are other cases in the books in which gifts have been held to be vested upon the language of the whole will, but as they establish no principle it seems unnecessary to cite them at length. See *Davies v. Fisher*, 5 B. 201; *Harrison v. Grimwood*, 12 B. 192; *Ingram v. Suckling*, 7 W. R. 386; *Bird v. Maybury*, 33 B. 351; *Pearman v. Pearman*, 33 B. 394; *Pearson v. Dolman*, 3 Eq. 315; *Perrott v. Davies*, 38 L. T. 52.

Gift to a class when the youngest attains 21.

10. When the gift is to a class when the youngest attains twenty-one, all who attain twenty-one will take vested interests whether they survive the time of distribution or not. But a member of the class dying under twenty-one takes nothing. *Leeming v. Sherratt*, 2 Ha. 14; *Parker v. Sowerby*, 1 Dr. 488; 17 Jur. 752; see 4 D. M. & G. 321; *Smith's*

*Will*, 20 B. 197; see *Sansbury v. Read*, 12 Ves. 75; *Ford* Chap. XXXV.  
*v. Rawlins*, 1 S. & St. 329; *In re Hunter's Trusts*, L. R.  
 1 Eq. 295.

Upon the question whether when the income is given to a class of children till the youngest attains twenty-one, and then the corpus, the case is distinguishable from those above cited, see *Re Grove's Trusts*, 3 Giff. 575; *Boulton v. Pilcher*, 29 B. 638; *Lloyd v. Lloyd*, 3 K. & J. 20, where a child dying under twenty-one took a vested interest; *Coldicott v. Best*, W. N. 1881, 150, where it did not.

Income given  
for mainten-  
ance till  
youngest  
attains 21,  
then capital.

If the income is to be applied in maintenance till the youngest child attains twenty-one, and the capital is then to be divided, namely, one-fifth to each of five children by name, they take vested interests at birth. *Cooper v. Cooper*, 29 B. 229; see *Re Lyman's Trust*, 2 L. T. N. S. 662.

And if there is a clear gift to the class, a direction that it is to be divided when the youngest attains twenty-one will not postpone the vesting. *Knox v. Wells*, 2 H. & M. 674.

III. Gifts to children contingent upon surviving their parents :—

1. In many cases where a gift to children has been made contingent upon their surviving their parents, the Courts have laid hold of slight ambiguities to give them vested interests at birth. Most of the cases upon this subject have arisen on marriage settlements where there is a strong presumption of intention to provide for children generally, whereas gifts by will are mere bounty. *Farrer v. Barker*, 9 Ha. 743; but see *Jackson v. Dorer*, 2 H. & M. 209.

It is, however, now clearly settled that in marriage settlements, as in wills, words of contingency must have their full force, and the Court will "lean" in favour of vesting only in cases of doubtful construction. *Whatford v. Moore*, 3 M. & Cr. 289; *Jeyes v. Savage*, 10 Ch. 555; see *In re Hamlet*; *Stephen v. Cunningham*, 39 Ch. D. 426.

Words of  
contingency  
must have  
their full  
force in  
settlements as  
in wills.

Thus, a gift, after life interests to parents, to the children living at their decease, or if there are any children then living to such children, only goes to those who survive their parents; *à fortiori*, if provision is made for the issue of children who

Gifts to  
children living  
at their  
parents'  
death.

**Chap. XXXV.** die before their parents leaving issue. *Jeyes v. Savage, supra*; *In re Deighton's Settled Estates*, 2 Ch. D. 783.

Force of the word "such."

The fact that the word "such" is sometimes omitted in some of the limitations will not cause its rejection, if it occurs in the limitation under which the children take. *Whatford v. Moore*, 3 M. & Cr. 270; *Skipper v. King*, 12 B. 29; *Wilson v. Mount*, 19 B. 292.

It may be rejected if inaccurately or inconsistently used.

But, it would seem, it may be rejected, if it appears on the whole will that it is incorrectly used. *Hougrave v. Cartier*, 3 V. & B. 79; see *Rye v. Rye*, 1 L. R. Ir. 413; *Dowglass v. Waddell*, 17 L. R. Ir. 884.

And if the parent has power to pay over their shares to *such* children in his lifetime, the contingency of surviving the parent will be rejected, since the testator cannot have meant shares paid to children who die before their parents to be returned. *Powis v. Burdett*, 9 Ves. 428; *Walker v. Simpson*, 1 K. & J. 713.

Where the interest was given for the maintenance of such children as should be living at the parents' decease until they should attain twenty-one, followed by a gift to the children when they attained twenty-one, it was held that children who attained twenty-one took vested interests, though they predeceased their parents. *Bradley v. Barlow*, 5 Ha. 589.

Where a testatrix, after giving a power to appoint by will to issue, gave the property in default of appointment to such issue, it was held that the term "such issue" included all the issue and not merely those who survived their parent. *In re Hutchinson; Alexander v. Jolley*, 55 L. J. Ch. 574; 54 L. T. 527.

Gift contingent upon surviving a parent explained by context.

2. There may be sufficient evidence of intention to show that children dying before their parents were to take vested interests, though the original gift is contingent upon their surviving them.

Thus, if there is a direction that children are to take vested interests at twenty-one, or upon marriage, "though such respective times may happen before the parents' decease," the prior gift is controlled. *Dalton v. Hill*, 10 W. R. 896.

The same is the case, if the shares of the children are expressly referred to by the testator as payable in their

parents' lifetime, and directed not to be paid till their deaths. Chap. XXXV.  
*Jackson v. Dover*, 2 H. & M. 209.

But the mere fact that the interests are to be vested at twenty-one but not to be transferred till after the parents' death, will not give children dying before their parents vested interests, the word vested being read as equivalent to payable. *Williams v. Haythorne*, 6 Ch. 782.

If the direction is that children, who attain twenty-one, or die under that age leaving issue, are to take vested interests, the direction will control the contingency, and children who attain twenty-one and die before their parents will take vested interests. *Williams v. Russell*, 10 Jur. N. S. 168.

3. So, too, children will take vested interests before their parents' death, if the property is given over in events which do not include the death of some of the children over twenty-one in their parents' lifetime, so that in that event the property would be undisposed of. *Perfect v. Lord Curzon*, 5 Mad. 442; *Torres v. Franco*, 1 R. & M. 649; *Swallow v. Binns*, 1 K. & J. 417; *Dixon v. Barkshire*, 34 B. 537; *In re Knowles*; *Nottage v. Buxton*, 21 Ch. D. 806.

Gift to children who survive their parents may be vested by the effect of the gift over.

4. In cases, where there is a gift to a class of children, if any children survive their parents, it is clear, that unless some children survive the parents the gift never arises. *Hotchkin v. Humfrey*, 1 Mad. 65; *Fitzgerald v. Field*, 1 Russ. 430.

Gift to a class upon a contingency.

But the contingency will not, without express words, be imported into the constitution of the class, so that if the contingency happens all members of the class will take whether they survive the contingency or not; thus, if there is a gift to A. for life, and then if he die leaving a child, to his children as tenants in common, and one child survives A., all his children, whether they survive him or not, will take. *Boulton v. Beard*, 3 D. M. & G. 608; *M'Lachlan v. Taitt*, 28 B. 407; 2 D. F. & J. 449; *Re Gratwicke*, 35 B. 315; *Re Orlebar's Settlement*, 20 Eq. 711; *Goddard's Trusts*, 1 R. 5 Eq. 14; *Hickling v. Fair*, (1899) A. C. 15; see *Blasson v. Blasson*, 2 D. J. & S. 665; *Taylor v. Graham*, 3 App. C. 1287.

The contingency is not to be imported into the constitution of the class.

Similarly, powers of raising different sums according to the number of children a man may have, will not be limited to

Chap. XXXV. mean the number of children capable of taking. *Knapp v. Knapp*, 12 Eq. 238; *In re Verschoyle's Trusts*, 3 L. R. Ir. 48; see *Rye v. Rye*, 1 L. R. Ir. 413.

Effect of gift over if no one of the class survive the contingency.

But if the gift is to the children of A. if he leaves any him surviving and there is a gift over if A. leaves no children him surviving, it would seem only children surviving A. would take. *Winn v. Fenwick*, 11 B. 438; *Wilson v. Mount*, 2 W. R. 448; 19 B. 292; *Sterens v. Pile*, 30 B. 284; *Stolworthy v. Sanicroft*, 12 W. R. 635; *Selby v. Whittaker*, 6 Ch. D. 239.

The word "such" will not be supplied so as to make a gift contingent.

If the gift is in the event of there being any children surviving at a particular time to "such" children, only those who survive the contingency can take, but the Court will not supply the word "such" if it does not occur in the limitation under which the children take, so as to cut down the class, though the omission may be accidental. *Woodcock v. Duke of Dorset*, 3 B. C. C. 569, corrected in 3 V. & B. 83; *King v. Hake*, 9 Ves. 439; *Stolworthy v. Sanicroft*, 12 W. R. 635.

Contingency reflected back.

If there is a gift in remainder or upon a contingency to a class, which would give the members of the class vested interests immediately, or upon the happening of the contingency, and there is a direction that if there be but one child living at the time of distribution, or when the contingency happens, the whole is to go to that child, the contingency of being then living has in several cases been reflected back into the constitution of the original class. *Smith v. Vaughan*, 8 Vin. Ab. 381, tit. Devise (Z. c.), pl. 32; *Spencer v. Bullock*, 2 Ves. Jun. 687; *Madden v. Ikin*, 2 Dr. & S. 207; *Lewis v. Templer*, 33 B. 625; *Cooper v. Macdonald*, 16 Eq. 258.

The point cannot, however, be said to be settled beyond dispute in the face of *Kimberley v. Tew*, 4 D. & War. 139.

5. A gift after life interests to A. "if alive" means if he is living when the prior interests determine. *In re Dundalk & Enniskillen Railway Co.*; *Ex parte Roebuck*, (1898) 1 Ir. 219; compare *Hodgson v. Smithson*, 8 D. M. & G. 604.

To what the word "then" refers.

When there is a gift after prior interests to persons "then living," the word then refers most naturally to the last antecedent; thus, in the case of a gift to A. for life, remainder to B. for life, remainder to a class "then living," the word then



refers to B.'s death, whether he dies before A. or not. *Archer v. Jegon*, 8 Sim. 446; *Wollaston's Settlement*, 27 B. 642; *Powis v. Matthews*, 11 W. R. 662; *Olney v. Bates*, 3 Dr. 319; *Heasman v. Pearse*, 7 Ch. 660; *Re Milne*; *Grant v. Heysham*, 56 L. T. 852; 57 L. T. 828; *Palmer v. Orpen*, (1894) 1 Ir. 32. Chap. XXXV.

On the other hand, if the object of the testator is not to limit successive interests, but to provide for personal enjoyment by the legatees by substituting for persons dying before the period of enjoyment a class of persons then living, the word then refers most naturally to the period of enjoyment. *Harvey v. Harvey*, 3 Jur. 949; *Hetherington v. Oakman*, 2 Y. & C. C. 299; *Gill v. Barrett*, 29 B. 373; see, too, *Heasman v. Pearse*, 7 Ch. 275.

It may be noticed that in a gift to several persons nominatim and their children then living, the contingency of being then living will not be applied to the parents as well as the children, unless there is something to show that parents and children were to form one homogeneous class. *Burrell v. Baskerfield*, 11 B. 255; *Cormack v. Copous*, 17 B. 397; *Turner v. Hudson*, 10 B. 222.

In a marriage settlement where lands were limited, after a life interest, to "all and every or any one or more child or children, or any grandchild or grandchildren or other issue then in being of the said intended marriage" as the settlor should appoint, it was held that the words "then in being" only referred to the grandchildren. *Leader v. Duffey*, 17 L. R. Ir. 279; 13 App. C. 294.

For cases in which the words "then living" may be construed as referring to the *stirpes*, see *Cooper v. Macdonald*, 16 Eq. 258; and see *Survivors*.

Construction of the words "then living."

#### IV. Vesting of interests under powers of appointment:—

Where there is a gift to certain persons as A. shall appoint, or a power to appoint certain property, and a gift in default of appointment, the persons to take in default of appointment take vested interests at the testator's death, subject to be divested by the exercise of the power. *Doe d. Willis v. Martin*, 4 T. R. 39; *Fearne*, C. R. 225; *In re Ware*; *Cumberlege v. Cumberlege-Ware*, 45 Ch. D. 269.

From what time persons taking under a power take vested interests.

**Chap. XXXV.** Thus, a gift to children as A. shall by will appoint vests in all the children, but an appointment of the whole in favour of an only surviving child is good. *Woodcock v. Renneck*, 4 B. 190; 1 Ph. 72.

If, however, the power is exercised in favour of the same persons as would have taken in default of appointment, a question arises whether the appointees are to be considered as taking under the original will or under the power.

It seems clear, that where the will authorises an appointment among persons, who would not all take in default of appointment, the appointees take under the exercise of the power. *Lee v. Olding*, 25 L. J. Ch. 580; 2 Jur. N. S. 850; *Vizard's Trusts*, L. R. 1 Ch. 588; *Sweetapple v. Horlock*, 48 L. J. Ch. 660; 11 Ch. D. 745.

Even if the power is merely distributive, so that the persons to take under the appointment and in default are the same, they take, nevertheless, under the exercise of the power, and not under the instrument creating it. *De Serre v. Clarke*, 18 Eq. 587.

Where a person on his marriage covenants to settle a share to which he is entitled in default of appointment, and the donee of the power subsequently appoints to him, the covenant is not void under sect. 91 of the Bankruptcy Act, 1869, as relating to property in which the bankrupt had no interest at the date of his marriage. *Re Andrews' Trusts*, 7 Ch. D. 635.

## CHAPTER XXXVI.

## PERPETUITY AND ACCUMULATION.

A LIMITATION by way of executory devise is void as too remote, if it is not to take effect until after the determination of one or more lives in being and upon the expiration of twenty-one years afterwards, as a term in gross and without reference to the infancy of any person who is to take under such limitation, or of any other person, allowance for gestation being made only in those cases where it actually exists. *Cadell v. Palmer*, 1 Cl. & F. 372.

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Rule against  
remoteness  
stated.

The fact that the executory interest is given to an ascertained person so that he and the present owner of the estate can together make a good title within the limits of perpetuity does not make the executory interest valid if the event upon which it is to take effect is too remote.

Thus, a covenant in a conveyance of land to reconvey in certain events not limited in time or an unlimited right of re-entry is void for remoteness. *London & South Western Railway v. Gomm*, 20 Ch. D. 562; *Dunn v. Flood*, 25 Ch. D. 629; 28 Ch. D. 586; *Mackenzie v. Childers*, 43 Ch. D. at p. 279, overruling *Birmingham Canal Company v. Cartwright*, 11 Ch. D. 421. See *In re Adams*, 24 Ch. D. 199; 27 Ch. D. 394.

Property cannot be given to a charity on an event which is too remote. *Company of Pewterers v. Governors of Christ's Hospital*, 1 Vern. 161; *Chamberlayne v. Brockett*, 8 Ch. 211.

How far the  
rule applies  
to charities.

But property which has been given to one charity can be given over to another on a remote event. *Christ's Hospital v. Grainger*, 16 Sim. 83; 1 Mac. & G. 460; *In re Tyler*; *Tyler v. Tyler*, (1891) 3 Ch. 252.

And property can be given to a charity for a limited, though

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uncertain, period, which may endure beyond the limits of perpetuity, the undisposed-of interest forming part of the testator's estate. *Walsh v. Secretary of State for India*, 10 H. L. 367; *In re Randell*; *Randell v. Dixon*, 38 Ch. D. 213.

But where property has been given absolutely to a charity, a testator cannot add a proviso for cesser on an event which may be too remote. *In re Bowen*; *Lloyd Phillips v. Davis*, (1893) 2 Ch. 491.

Gift of English leaseholds.

A gift by a foreign will of leaseholds in England is governed by the rules of English law relating to perpetuity and accumulation. *Freke v. Lord Carbery*, 16 Eq. 461; see *ante*, p. 1.

Direction to buy land in foreign country to be settled on remote uses.

A direction to lay out money in the purchase of land in Scotland, to be settled to uses which are good according to Scotch law, but would be void for remoteness in England, is valid. *Fordyce v. Bridges*, 2 Ph. 497, 515.

To what rules legal remainders are subject.

It has been decided (after much conflict of opinion) that legal remainders are subject to the rule against perpetuities. *In re Frost*; *Frost v. Frost*, 43 Ch. D. 246.

It is conceived, however, that under the old law a contingent remainder limited after the life interest of a living person could not be void for perpetuity, inasmuch as, if it had not become vested when the life interest determined, it failed; it must take effect, therefore, at the expiration of a life in being or not at all.

Legal remainder to unborn son of unborn person void.

Legal remainders are also controlled by an analogous doctrine, that no estate by way of remainder can be limited to the unborn child of an unborn person, whether such estate is expressly limited to take effect within the limits of perpetuity or not; so that, for instance, in a limitation to A. an unmarried person for life, remainder to his first son for life, remainder to the first son of the first son of A., born in A.'s life, or within twenty-one years afterwards, in fee, the ultimate remainder in fee would be bad, though clearly within the limits of perpetuity. 2 Rep. 51a; 10 Rep. 50b; *Monypenny v. Dering*, 2 D. M. & G. 145; *Whitby v. Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85.

Common law condition.

The rule against perpetuity applies to common law conditions. *In re Hollis' Hospital & Hague*, (1899) 2 Ch. 540.

In applying the rule against perpetuities, the state of things existing at the testator's death, and not at the date of the will, is to be looked at. *Vanderplank v. King*, 3 Ha. 17; *Cattlin v. Brown*, 11 Ha. 382; *Peard v. Kekewich*, 15 B. 166.

But possible and not actual events are to be considered, and, therefore, if at the testator's death a gift might possibly not have vested within the proper time, it will not be good, because, as a matter of fact, it did so vest. *Lord Dungannon v. Smith*, 12 Cl. & F. 546; see *In re Roberts*; *Repington v. Roberts-Gawen*, 19 Ch. D. 520; *Abbiss v. Burney*; *In re Finch*, 17 Ch. D. 211; *In re Harvey*; *Peek v. Savory*, 39 Ch. D. 289; *In re Wood*; *Tullett v. Colville*, (1894) 2 Ch. 310; 3 Ch. 381.

The fact that a woman is past the age of child-bearing at the date of the will, or death, is not to be considered, and the chance of such a woman having children is a possible event for the purposes of determining whether a gift is void for perpetuity or not. *Jee v. Audley*, 1 Cox, 324; *In re Sayer's Trusts*, 6 Eq. 319; *In re Dawson*; *Johnston v. Hill*, 39 Ch. D. 155; *In re Hocking*; *Michell v. Loe*, (1898) 2 Ch. 567; not following *Cooper v. Laroche*, 17 Ch. D. 368.

A gift for the maintenance of the testator's dogs and horses during their lives is not void for perpetuity. *In re Dean*; *Cooper-Dean v. Sterens*, 41 Ch. D. 552.

Any gift not being charitable, the object of which is to tie up property for an indefinite time, is void; as, for instance, a devise of land to the trustees of the Penzance Library, to hold to them and their successors for ever, for the maintenance and support of the library. *Carne v. Long*, 2 D. F. & J. 75; *Thomson v. Shakespear*, 1 D. F. & J. 399; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *In re Clark's Trust*, 1 Ch. D. 497; *Re Dutton*, 4 Ex. D. 54; *In re Sheraton's Trusts*, W. N. 1884, 174; *Hoare v. Hoare*, 56 L. T. 147.

So, too, a restriction upon alienation beyond lives in being and twenty-one years after, is bad, and the case of a married woman is no exception to the rule. *Armitage v. Coates*, 85 B. 1; *In re Teague's Settlement*, 10 Eq. 564; *In re Cunynghame's Settlement*, 11 Eq. 324; *In re Michael's Trusts*, 46 L. J. Ch. 651; *In re Ridley*; *Buckton v. Hay*, 11 Ch. D. 645.

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— The rule is to be applied to the state of things existing at the testator's death.

Possible not actual events are to be considered.

That a woman past child-bearing may have children is a possible event within the rule.

Gift for life of animal good.

Gift tending to tie up property for an indefinite time is void.

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Devise upon  
remote event.

It is clear that a devise of property to a named person to take effect upon a remote event is void. See *Bankes v. Holme*, 1 Russ. 394, n.; *Lewis v. Templer*, 33 B. 625; *Commissioners of Donations v. De Clifford*, 1 D. & War. 245, 254.

Where a lease for fifty-four years was bequeathed for life with remainders, followed by a direction upon the expiration of the lease to convey freeholds of the testator upon the same trusts, it was held that the direction was not void for perpetuity. *Wood v. Drew*, 33 B. 610.

Whether  
limitations  
subsequent to  
an estate tail  
can be too  
remote.

No questions with regard to remoteness can arise on limitations subsequent to an estate tail, provided the subsequent limitations must take effect, either during the existence of the estate tail or at the moment of its determination. *Cole v. Sewell*, 4 D. & War. 1; 2 H. L. 186; *Doe d. Winter v. Perratt*, 9 Cl. & F. 606; *Heasman v. Pearse*, 7 Ch. 275.

The test is  
that they  
must be  
barrable as  
long as they  
subsist.

The foundation of this rule is, that if the subsequent limitations are such, that they must take effect during the existence of the estate tail, or at the moment of its determination, or not at all, they are always barrable, and therefore do not tend to restrain the free disposal of property.

And the converse follows, that, if the subsequent limitations are not always barrable, they will be subject to the rules of remoteness. The rule is sometimes laid down absolutely, that no limitations after estates tail are too remote, but it can only be accepted with the qualification above laid down. Otherwise, by means of limitations of equitable remainders which do not fail by failure of the prior estates, and are not barrable after the estate tail has determined, property might possibly be tied up for an almost indefinite time.

The trusts of  
a term pre-  
cedent to an  
estate tail  
may be void  
for remote-  
ness.

Where interests are precedent to estates tail, they are, of course, not barrable, and the ordinary rules of perpetuity apply. Therefore, where a term precedent to estates tail is limited to trustees, upon trusts which are too remote, the trusts are void. *Case v. Drosier*, 2 Kee. 764; 5 M. & Cr. 246; *Cochrane v. Cochrane*, 11 L. R. Ir. 361.

And where the term is precedent this will be the case, even though the event in which the trusts are to be executed would

become impossible if the subsequent estates tail were barred. *Sykes v. Sykes*, 13 Eq. 56.

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Similarly, powers not strictly precedent to, but concurrent with, an estate tail, for instance, powers to accumulate during the minorities of any persons entitled under the limitations of the will, whether the accumulations are expressly carried over or not, or to enter and manage the property, are void. *Marshall v. Holloway*, 2 Sw. 482; *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54; *Browne v. Stoughton*, 14 Sim. 369; *Turvin v. Newcome*, 3 K. & J. 16; *Floyer v. Bankes*, 8 Eq. 114.

Concurrent  
terms.

But a trust for accumulation for the purpose of paying off debts or incumbrances upon the estate of the testator is valid. *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54, 65; *Bateman v. Hotchkin*, 10 B. 426; *Briggs v. Earl of Oxford*, 1 D. M. & G. 363.

Trust for  
accumulation  
to pay debts  
is good.

And a direction to accumulate a fund till it reaches a certain amount, and then to apply it for the benefit of certain named persons for their lives, and the life of the survivor, is not void for perpetuity, if the fund, whether it has reached the amount directed or not, is to be divided at the death of the survivor. *Oddie v. Brown*, 4 De G. & J. 179.

A direction to  
accumulate  
till a fund  
reaches a  
certain sum.

No doubt powers of sale and leasing would be void, if the testator clearly shows that he intended them to subsist, or to arise beyond the limits of perpetuity; see *Ware v. Polhill*, 11 Ves. 257; *Hale v. Pew*, 25 B. 335; *Goodier v. Johnson*, 18 Ch. D. 441, 446.

Power of sale  
and leasing.

But powers of sale, whether collateral or subsequent, though given in general terms in a settlement containing limitations for life, with remainders in fee or in tail, with an ultimate remainder in fee, are good, because the power is spent as soon as the object of the settlement is at an end by the absolute interest vesting in possession. *Biddle v. Perkins*, 4 Sim. 135; *Nelson v. Callow*, 15 Sim. 353; *Waring v. Coventry*, 1 M. & K. 249; *Lantsbery v. Collier*, 2 K. & J. 709; *Taite v. Swinstead*, 26 B. 525; *In re Lord Sudeley & Baines & Co.*, (1894) 1 Ch. 334; *In re Dyson & Fowke*, (1896) 2 Ch. 720.

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Trusts for sale  
may be void.

A trust for sale if it arises on a remote event is void, but the invalidity of the trust for sale will not destroy the rights of the persons to take the proceeds if they are ascertained within the proper limits. *In re Darverson*; *Bowen v. Churchill*, (1893) 3 Ch. 421; *Goodier v. Edmunds*, (1893) 3 Ch. 455; *In re Wood*; *Tullett v. Colville*, (1894) 2 Ch. 310; 3 Ch. 381.

Trust for  
maintenance.

Where there is a trust for the maintenance of the children of a living person until they respectively attain twenty-three, followed by a gift to the children who attain twenty-three, the trust for maintenance is good though the gift of the capital is void. *Gooding v. Read*, 4 D. M. & G. 510; *In re Wise*; *Jackson v. Parrott*, (1896) 1 Ch. 281.

Gift to persons  
who must be  
living at the  
testator's  
death and at  
the time of  
vesting can-  
not be too  
remote.

The vesting of property may be postponed for any length of time, provided it must ultimately vest, if at all, in persons born at the death of the testator, and living at the time of vesting, since in such a case it must vest absolutely within lives in being. *Lachlan v. Reynolds*, 9 Ha. 796.

But the gift is void for perpetuity, though it must vest in persons born within lives in being at the testator's death, and living when the event happens, if it may not so vest within lives in being and twenty-one years afterwards. *Jee v. Audley*, 1 Cox, 324; see *Garland v. Brown*, 10 L. T. N. S. 292; *In re Hargreaves*; *Midgley v. Tatley*, 43 Ch. D. 401; overruling *Avern v. Lloyd*, 5 Eq. 383; see, too, *Stuart v. Cockerell*, 7 Eq. 363.

Gift for life  
to unborn  
children of a  
tenant for life  
is good.

A limitation for life to the unborn children of a tenant for life, or to the descendants of two tenants for life, is good. *Avern v. Lloyd*, 5 Eq. 383; *Stuart v. Cockerell*, 7 Eq. 363; see 5 Ch. 713; *Hampton v. Holman*, 5 Ch. D. 183; *In re Roberts*; *Repington v. Roberts-Gawen*, 19 Ch. D. 520; overruling *Hayes v. Hayes*, 4 Russ. 311.

Cross limita-  
tions between  
unborn  
tenants for  
life.

There appears to be no doubt that cross limitations for life between unborn tenants for life would be valid, and, moreover that limitations for life to successive generations to come into being within the bounds of perpetuity are also valid. *Ashley v. Ashley*, 6 Sim. 358; *Cadell v. Palmer*, 1 Cl. & F. 372; see, however, *Stuart v. Cockerell*, 7 Eq. 363, p. 370.

Upon the same principle a limitation to the unborn children



of a tenant for life, and the survivors and survivor of them, during the life of the longest liver has been sustained. *Gooch v. Gooch*, 14 B. 565 ; 3 D. M. & G. 366.

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If, however, the limitation is not simply to the survivors of the tenants for life, but to the survivors if there is no issue of the tenant for life dying, and if there is issue, then to the issue, the limitations over are bad. *Gooch v. Gooch*, 14 B. 565 ; 3 D. M. & G. 366, 384.

Substitution  
of issue.

And as a gift to an unborn person for life is good, it follows that the life interest may be limited to endure till the happening of some event during the life, such as marriage, though the event may possibly happen beyond the limits of perpetuity and that a remainder may be given upon the determination of the life interest. *Wainwright v. Miller*, (1897) 2 Ch. 255 ; *In re Gage* ; *Hill v. Gage*, (1898) 1 Ch. 498.

After life interests to unborn persons, the absolute interest can be given to persons either living at the death of the testator or ascertained within the limits of perpetuity. *Evans v. Walker*, 3 Ch. D. 211 ; *In re Roberts* ; *Repington v. Roberts-Gawen*, 19 Ch. D. 520.

Remainders  
after life  
interests of  
unborn  
persons.

But the absolute interest cannot be limited to a person who may not be ascertained within lives in being and twenty-one years afterwards. For instance, after life interests to unborn children, a limitation to the eldest grandchild living at the determination of the life estates, or a limitation to the survivor of the tenants for life, would be void. *Gooch v. Gooch*, 3 D. M. & G. 366 ; *Garland v. Brown*, 10 L. T. N. S. 292.

Limitations following as remainders upon limitations void for perpetuity are themselves void, whether within the line of perpetuity or not. *Robinson v. Hardcastle*, 2 B. C. C. 22 ; 2 T. R. 241, 380, 781 ; *Routledge v. Dorril*, 2 Ves. Jun. 357 ; *Brudenell v. Elwes*, 1 East, 442 ; *Beard v. Westcott*, 5 Taunt. 398 ; 5 B. & Ald. 801 ; T. & R. 25 ; *Momyppenny v. Dering*, 2 D. M. & G. 145.

Limitations  
dependent on  
void limita-  
tions are  
themselves  
void.

But where a power of appointment is given to arise upon an event beyond the limits of perpetuity a gift in default of appointment is valid. *In re Abbott* ; *Peacock v. Frigout*, (1893) 1 Ch. 54.

Gift in default  
of appoint-  
ment.

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In the former class of cases the remaindermen are only intended to take if there is no one to take under the prior limitations. In the latter the gift in default of appointment is intended to take effect unless displaced by a valid exercise of the power.

Alternative  
contingent  
limitation.

An alternative limitation following limitations void for perpetuity may be valid; for instance, if there is a devise to A. for life, with remainder to his unborn son for life, with remainder to the unborn son of such unborn son in tail, with a gift over in default of issue of the body of A., or in case of his not leaving any at his decease, the gift over in the event of A. leaving no issue at his decease is valid. *Monypenny v. Dering*, 2 D. M. & G. 145.

Splitting  
compound  
event.

Where property is given over on a compound event, *i.e.*, an event involving several contingencies, the gift over cannot, except in the case mentioned below, be split up into as many gifts over as there are possible events, so as to sustain the gift over whenever the actual event falls within the limits of perpetuity. For instance, if there is a gift to A. for life, remainder to his children who attain twenty-five, and if no children attain twenty-five over and A. never has a child, the gift over cannot be read as if it were if A. shall die without having had a child or if all his children die under twenty-five. *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358; *Jee v. Audley*, 1 Cox, 324; *Lord Dungannon v. Smith*, 12 Cl. & F. 546; *Burley v. Evelyn*, 16 Sim. 290; *Monypenny v. Dering*, 2 D. M. & G. 145; *Re Thatcher's Trusts*, 26 B. 365; *In re Harvey*; *Peek v. Savory*, 39 Ch. D. 289; *In re Bence*; *Smith v. Bence*, (1891) 3 Ch. 242; doubting *Watson v. Young*, 28 Ch. D. 436.

But if the testator has himself separated the gift so as to make it take effect on the happening of any of several events, and the event which happens is not too remote, the gift over is good. *Longhead v. Phelps*, 2 W. Bl. 704; *Miles v. Harford*, 12 Ch. D. 691.

When gift  
over may be  
split.

The rule that a compound gift over cannot be split into its component events is subject to the exception that in the case of legal limitations of real estate where a devise over includes two contingencies which are in their nature divisible, and

one of which can operate as a legal remainder, they may be divided though included in one expression. Thus, if there is a devise to A. for life, remainder to his children who attain twenty-three, with a devise over if none attain twenty-three, and A. has no children, the implied gift over in that event takes effect as a valid remainder. *Evers v. Challis*, 7 H. L. 531; discussed *In re Bence*, *supra*.

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Where there is a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity—for instance, to the children of a living person who shall attain twenty-five—the whole gift is void. *Leake v. Robinson*, 2 Mer. 363; *Boughton v. Boughton*, 1 H. L. 406; *Merlin v. Blagrove*, 25 B. 125; *Stuart v. Cockerell*, 7 Eq. 363; 5 Ch. 713; *Patching v. Barnett*, 49 L. J. Ch. 665; 51 *ib.* 74; *Blight v. Hartnoll*, 19 Ch. D. 294.

Gift to a class to be ascertained beyond the limits of perpetuity is void.

Similarly, where there is a gift after the death of an unborn tenant for life to the children and grandchildren of a living person, the gift is void for remoteness, the children and grandchildren being intended to form one class. *Stuart v. Cockerell*, 7 Eq. 363; 5 Ch. 713.

But if the remoter issue are to take substitutionally, the gift to the original class will be good, though the substitutional gifts may be void for remoteness. *Baldwin v. Rogers*, 3 D. M. & G. 649; *Packer v. Scott*, 33 B. 511; *Goodier v. Johnson*, 18 Ch. D. 441.

The rule against perpetuity applies where the gift is to a remote class and a named person as tenants in common, the shares not being ascertainable within the proper limits. *Porter v. Fox*, 6 Sim. 485; *In re Mervin*; *Mervin v. Crossman*, (1891) 3 Ch. 197.

Whether a gift to an individual and a remote class is void.

Perhaps, however, it would not apply to a similar gift in joint tenancy. 1 Jarman, 229.

If by the application of the rules for ascertaining the class the class must be finally ascertained within the limits of perpetuity, the gift is good. *Picken v. Matthews*, 10 Ch. D. 264; see *Re Whitten*; *King v. Whitten*, 62 L. T. 391.

Where particular sums are given to each of the members of a class, the gift is good as to those members who are within

Distinction between gift of a fund to a

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class and gift  
of a sum to  
each member  
of a class.

Cases where  
it is possible  
to sever valid  
and remote  
shares.

the limits of perpetuity. *Storrs v. Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Wilkinson v. Duncan*, 30 B. 111.

This principle has been extended to cases where, though the gift is in terms to a class, the effect of it is to give definite sums ascertained at the determination of lives in being, to each of several classes, some of which are within and some without the line of perpetuity; for instance, if the gift is to A. for life, remainder to A.'s children for life, and the share of each child to go to his children, since the share of each of A.'s children is ascertained at A.'s death, the effect is to give a definite sum to each group of A.'s grandchildren, and the gift is good as regards those grandchildren whose parents were born in the testator's lifetime. *Griffith v. Pownall*, 13 Sim. 393; *Cattlin v. Brown*, 11 Ha. 372; *Knapping v. Tomlinson*, 12 W. R. 784; 10 Jur. N. S. 626; *In re Russell*; *Dorrell v. Dorrell*, (1895) 2 Ch. 698.

And the principle is the same, where the gift is to A. for life, then to B.'s children living at A.'s death, who should attain twenty-one, the share of each daughter to be settled on her for life, remainder to her children. In such a case the direction to settle was held good with regard to a child of B. *in esse* at the testator's death. *Wilson v. Wilson*, 4 Jur. N. S. 1076; 28 L. J. Ch. 95.

And, apparently, if the gift were directly to the grandchildren instead of through the direction to settle, the construction would be the same. *Greenwood v. Roberts*, 15 B. 92, which at first sight appears to decide the contrary, is explained by the M.R., in *Webster v. Boddington*, 26 B. 128, to have been decided on a different principle. Whether the principle was rightly applied, *quere*.

But if the share given to grandchildren is contingent upon events, which may happen beyond the limits of perpetuity, and the share may never become vested, in which event the shares taken by the other *stirpes* would be increased, then the shares of each *stirps* would not be ascertainable within the proper limits, and the whole will fail; for instance, if the gift is to A. for life, then to the children of A., and the children of such children who attain twenty-one, the children to take a parent's share. *Webster v. Boddington*, 26 B. 128; *Seaman v. Wood*,

22 B. 591; *Smith v. Smith*, 5 Ch. 342; *Hale v. Hale*, 3 Ch. D. 643; *Bentinck v. Duke of Portland*, 7 Ch. D. 693; *Pearks v. Moseley*, 5 App. C. 714; see *Salmon v. Salmon*, 29 B. 27; *Re Whitten*; *King v. Whitten*, 62 L. T. 391; *In re Bence*; *Smith v. Bence*, (1891) 3 Ch. 242.

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Where there is a direction that female members of a class are to be subject to a restraint upon anticipation, and the direction is so expressed as not to deal with the separate shares, it appears not to be clear whether the direction can be split so as to be valid as regards members of the class born in the testator's lifetime. *Armitage v. Coates*, 35 B. 1; *In re Ridley*; *Buckton v. Hay*, 11 Ch. D. 645; *In re Michael's Trusts*, 46 L. J. Ch. 651, are against, while *Herbert v. Webster*, 15 Ch. D. 610, is in favour of splitting.

Restraint upon anticipation.

Where there is a gift to a person by some particular description, the gift will be void, unless it is clear that there must be some person answering the description within the limits of perpetuity. Thus, a trust to convey to such person as for the time being would take by descent as heir male of the body of the testator's grandson, when some such person should attain the age of twenty-one, is void. *Lord Dungannon v. Smith*, 12 Cl. & F. 546; *Ibbetson v. Ibbetson*, 10 Sim. 495; 5 M. & Cr. 26; *Wainman v. Field*, Kay, 507; *Patching v. Barnett*, 51 L. J. Ch. 74.

Gift to a person satisfying a particular description is void unless there must be some such person within the limits of perpetuity.

How far the words, "as far as the rules of law and equity permit," would restrain the gift to such persons as satisfy the description within the limits of perpetuity, seems not clearly settled.

Effect of the words "as far as the rules of law and equity permit."

Where there was a gift (after life interests to the testator's wife, Lady Vere, and her son, Lord Vere) to the person who should from time to time be Lord Vere, it being the testator's will that the goods should be held with the title of the family, as far as the rules of law and equity permit, and the testator left a son, Lord Vere, and two sons of the son living at his death, the gift was held to vest absolutely in the first grandson who became Lord Vere. *Tollemache v. Earl of Coventry*, 2 Cl. & F. 611; 8 Bl. N. S. 547. See 12 Cl. & F. 555, n.; *In re Viscount Exmouth*; *Viscount Exmouth v. Praed*, 23

*Tollemache v. The Earl of Coventry*.

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Ch. D. 158. See, too, per Lord St. Leonards, in *Ker v. Lord Dungannon*, 1 D. & War. 536; and see *Mackworth v. Hinxman*, 2 Kee. 658.

It seems, a trust of chattels for the person or persons who should, for the time being, be in actual possession of certain settled estates, to the end that such chattels may go along with the same estates, "so far as the rules of law or equity will permit," but so that they shall not vest in any person becoming entitled to the estates for an estate of inheritance, unless he attain twenty-one, would be good, though in the absence of those words it would be bad. *Harrington v. Harrington*, L. R. 5 H. L. 87.

On the effect of the words, "as far as the law allows," see *Pownall v. Graham*, 33 B. 242.

Direction that  
personalty is  
not to vest in  
a tenant in  
tail dying  
under 21.

Where personalty is given upon the trusts of real estate, which has been settled upon living persons for life, remainder to their sons in tail, and there is a direction that the personalty is not to vest in any tenant in tail who dies under twenty-one, the clause is not void for remoteness, but refers only to tenants in tail by purchase, since none but tenants in tail by purchase can be said to take personalty under the will, personalty not being descendible. *Christie v. Gosling*, L. R. 1 H. L. 279; *Martelli v. Holloway*, L. R. 5 H. L. 532.

In such a case, in the event of a tenant in tail by purchase dying under twenty-one, leaving issue, the realty and personalty would become severed, since the realty would go to the issue, and the personalty to the next tenant in tail by purchase. But if the disposition of the personal estate contains or involves any trust for a tenant in tail who takes real estate by descent, the term tenant in tail could not be limited to tenants in tail by purchase. See per Lord Westbury, 1 D. J. & S. 1; *Ibbetson v. Ibbetson*, 10 Sim. 495; 5 M. & Cr. 26; *Ferrand v. Wilson*, 4 Ha. 344.

As regards appointments under powers:—

Power exer-  
cised within  
the limits of  
perpetuity  
good.

A power, though authorising an appointment which would be void for perpetuity, is valid if the appointment is kept within the proper limits. *Slark v. Dakyns*, 10 Ch. 85.

Where the power is a general power to appoint by deed or will, the appointees need only be capable of taking under the instrument exercising the power.

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General  
powers.

The same principle applies to a general power to appoint by will. *Rous v. Jackson*, 29 Ch. D. 521; *In re Flower*; *Edmonds v. Edmonds*, 55 L. J. Ch. 200; 53 L. T. 717; 34 W. R. 149; *Stuart v. Babington*, 27 L. R. Ir. 551; not following *In re Powell's Trusts*, 39 L. J. Ch. 188.

In the case of powers of appointment to particular classes of persons, the person to whom the appointment is made must be capable of taking under the instrument creating the power. *In re Powell's Trusts*, *supra*.

Special  
powers.

The question whether an appointment is valid is determined by the state of things existing when the appointment takes effect. *Wilkinson v. Duncan*, 30 B. 111; *Von Brockdorff v. Malcolm*, 30 Ch. D. 172.

Thus, an appointment under a special power will be good if, at the time when the appointment takes effect, the persons to take under it are objects of the power. *In re Coulman*; *Munby v. Ross*, 30 Ch. D. 186.

Where a marriage settlement gave a power to appoint to children of the marriage, an appointment to a son for life, with remainder to such persons as he should by will appoint, was held void as to the remainder. *Wollaston v. King*, 8 Eq. 165; *In re Brown & Sibly*, 3 Ch. D. 156; *Hodgson v. Halford*, 11 Ch. D. 959; *Hutchinson v. Tottenham*, (1898) 1 Ir. 403; (1899) 1 Ir. 344.

So a power in a settlement to appoint to children cannot be exercised by an appointment to take effect upon the marriage of an unmarried child. *Morgan v. Gromow*, 16 Eq. 1.

When a power is well executed, but a restraint upon anticipation is imposed upon the enjoyment, which is void for remoteness, the restraint will be rejected. *Fry v. Capper*, Kay, 163; *In re Teague's Settlement*, 10 Eq. 564; *In re Cunynghame's Settlement*, 11 Eq. 324; *Shute v. Hogge*, 58 L. T. 546; see *ante*, p. 521.

Invalid  
restrictions  
rejected.

And when there is an absolute gift, subsequent qualifications of the gift which are void for remoteness will be rejected.

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*Carver v. Bowles*, 2 R. & M. 306; *Ring v. Hardwick*, 2 B. 352; *Cooke v. Cooke*, 38 Ch. D. 202; *Re Boyd*; *Nield v. Boyd*, 63 L. T. 92; *Dowglass v. Waddell*, 17 L. R. Ir. 384.

THE CY PRÈS DOCTRINE.

In many cases limitations of real estate, in themselves void for perpetuity, have been made good by the application of the so-called doctrine of *cy près*.

*Cy près* doctrine is a rule of construction.

This doctrine is a rule of construction, and applies not merely to executory trusts. *Monypenny v. Dering*, 16 M. & W. 418; 2 D. M. & G. 145; *Parfitt v. Hember*, 4 Eq. 443; *Hampton v. Holman*, 5 Ch. D. 183.

It also applies to the execution of a power by will. *Line v. Hall*, 43 L. J. Ch. 107.

Parent will take an estate tail where the effect will be to give the property in the course marked out by the testator.

1. Where a testator has devised lands in a manner transgressing the limits of perpetuity, and the Court can, by giving estates tail to any of the devisees, carry the property in the precise course marked out by the testator, supposing the estates left to themselves, it will do so. *Humberston v. Humberston*, 1 P. W. 330; *Monypenny v. Dering*, 16 M. & W. 418; 2 D. M. & G. 145; *Parfitt v. Hember*, 4 Eq. 443.

Thus, a limitation to an unborn person for life, remainder to his children successively, in tail, will give the unborn person an estate tail; cases *supra*.

Doctrine applied to some members of a class and to part of the property devised.

The doctrine applies though the children meant to take jointly in tail.

And the doctrine may be applied to some of a class, and not to others; as well as to a portion of the property included in a devise, and not to the rest. *Vanderplank v. King*, 3 Ha. 1; *Line v. Hall*, 22 W. R. 124; 43 L. J. Ch. 107.

2. And where, by giving an estate tail to the parent, all the objects intended to be benefited by the testator would be included, this construction will be adopted, although the children were meant to take jointly in tail as purchasers. *Pitt v. Jackson*, 2 B. C. C. 51, cit. 2 Ves. Jun. 349; *Vanderplank v. King*, 3 Ha. 1; *Williams v. Teale*, 6 ib. 239.

Limits of the doctrine.

3. The doctrine will, however, not be applied where the result would be to carry the estate to persons not intended to be benefited by the testator. *Monypenny v. Dering*, 16 M. & W. 418; 7 Ha. 568; 2 D. M. & G. 145.



4. It has sometimes been said that the *cy près* doctrine does not apply where the only intention is to create successive life estates for ever, but the point is not covered by authority. It is clear that the doctrine will not apply where the intention is only to create a limited number of life estates on the principle already stated. *Seaward v. Willock*, 5 East, 198.

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Whether it applies where the intention is to create life estates for ever.

Nor will it apply where successive terms of years, determinable on the death of the devisee, are given. *Somerville v. Lethbridge*, 6 T. R. 218; *Beard v. Westcott*, 5 B. & Ald. 81; T. & R. 25.

On the other hand, it is clear that where an estate tail is given by force of the limitation itself, words indicating that the successive interests are to be for life will be rejected, whether the estate tail is given by direct words (a) or by the effect of a gift over in default of issue (b). *Doe d. Elton v. Stenlake*, 12 East, 515; *Reece v. Steel*, 2 Sim. 293; *Hugo v. Williams*, 14 Eq. 225; *Forsbrook v. Forsbrook*, 3 Ch. 93 (a); *Mortimer v. West*, 2 Sim. 274; *Woollen v. Andrews*, 2 Bing. 126; *Brooke v. Turner*, 2 Bing. N. C. 422; *Parfitt v. Hember*, 4 Eq. 443 (b).

On the whole, there seems to be no reason why the same construction should not apply where the testator attempts to create life estates for ever. See per Sir J. Rolt, in *Forsbrook v. Forsbrook*, 3 Ch. p. 99, and *Parfitt v. Hember*, 4 Eq. 443, where no stress was laid on the gift in default of issue. And on this ground only *Woollen v. Andrews* and *Mortimer v. West*, where the gift over was not on an indefinite failure of issue, can be held satisfactory. See *Hampton v. Holman*, 5 Ch. D. 188.

5. The *cy près* construction does not apply where the estates are limited to children of unborn persons in fee. *Bristow v. Warde*, 2 Ves. Jun. 396; *Hale v. Pew*, 25 B. 335.

It does not apply where the children take in fee.

The doctrine does not apply to personality nor to a mixed fund. *Routledge v. Dorril*, 2 Ves. Jun. 365; *Boughton v. James*, 1 Coll. 44; 1 H. L. 406.

It does not apply to personality.

Where a parent having power to appoint to sons in tail appoints to them for life with remainders in tail, and puts them to their election between benefits given by the will

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and their rights in default of appointment, the doctrine of *cy près* has no application. *In re Denneby's Estate*, 17 Ir. Ch. 97.

**ACCUMULATION.**

What amounts to direction to accumulate.

A direction that surplus income during a given period, and all accumulations thereof, are to go in augmentation of capital amounts to a direction to invest the income and the resulting income of the investment of income. *Wentworth v. Wentworth*, (1900) A. C. 163. See *In re Cox*; *Cox v. Edwards*, W. N. 1900, 89.

Trust for accumulation beyond the limits of perpetuity is void *in toto*.

A trust for accumulation beyond the limits of perpetuity is entirely void *ab initio*, whether before or since the Thellusson Act, and whether it be for a purpose excepted from the operation of the Act or not, unless it be for the payment of debts. *Curtis v. Lukin*, 5 B. 147; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Smith v. Cuninghame*, 13 L. R. Ir. 480.

The Thellusson Act.

And by the Thellusson Act (39 & 40 Geo. III. c. 98) accumulation by will is restrained for any longer term than twenty-one years from the death of the testator, or during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of the testator, or during the minority or respective minorities only of any person or persons who, under the trusts of the will, would for the time being, if of full age, be entitled to the rents and profits or the interest directed to be accumulated.

By sect. 2 provisions for the payment of the debts of the deviser or other person or persons, and provisions for raising portions of the children of the deviser, or of any person taking any interest under the will, and directions touching the produce of timber or wood, are excepted from the Act.

The Accumulations Act, 1892.

By the Accumulations Act, 1892 (55 & 56 Vict. c. 58), accumulation by will for the purchase of land only is restricted to the minority or respective minorities of any person or persons who under the trusts of the will would for the time being, if of full age be entitled to receive the rents, issues, profits, or income so directed to be accumulated.

A direction that the rents of leaseholds shall be capitalised for twenty-one years and become capital moneys of a settlement thereby made of realty, and subject to the powers of the Settled Land Acts, is not a direction to invest in land only within the Act, inasmuch as capital moneys may be applied otherwise than in the purchase of land. *In re Danson*; *Bell v. Danson*, 13 R. 638.

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An express direction to accumulate is not necessary to bring the property within the statute; it is enough if the property is given in such a manner that accumulation becomes necessary. *Tench v. Cherse*, 6 D. M. & G. 453; *Macdonald v. Bryce*, 2 Kee. 276; the decree in *Countess of Bective v. Hodgson*, 10 H. L. 656; *Wade Gery v. Handley*, 1 Ch. D. 653; 3 Ch. D. 374.

The statute applies if property is so given as to involve accumulation.

But when the property is directed to be applied to certain purposes at once, but is accumulated owing to the neglect of trustees, or from some other reason, the statute does not apply. *Lombe v. Stoughton*, 12 Sim. 304; where the direction to accumulate was merely subsidiary to the general trusts. See *Phipps v. Kelynge*, 2 V. & B. 57.

Accumulation by trustees of money to be laid out at once is not within the statute.

A direction to keep up policies effected by the testator in his lifetime on the lives of his children, the policies to be settled in case of marriage on their wives and children, is not a trust for accumulation within the statute. *Bassil v. Lester*, 9 Ha. 177; *In re Vaughan*; *Halford v. Close*, W. N. 1888, 89.

Direction to keep up policies is not within the statute.

A trust to repair is not within the Act. *Vine v. Raleigh* (1891) 2 Ch. 13; *In re Mason*; *Mason v. Mason*, (1891) 3 Ch. 467.

Repairs and improvements.

Nor is a trust to improve, provided the improvements be such as would properly be defrayed out of income. Cases *supra*.

A testator may direct accumulation during any one, but not more, of the periods allowed by the statute. *Wilson v. Wilson*, 1 Sim. N. S. 288; *Jagger v. Jagger*, 25 Ch. D. 729.

Testator may select any one period permitted by the statute for accumulation.

The period of twenty-one years is to be calculated from the death of the testator, exclusive of the day of his death, and must be a period immediately following his death. *Webb v. Webb*, 2 B. 493; *Gorst v. Lowndes*, 11 Sim. 484; *Shaw v. Rhodes*, 1 M. & Cr. 154; *A.-G. v. Poulden*, 3 Ha. 555.

Period of 21 years runs from the death.

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Period of the  
minority of  
any person.

The words of the statute permitting accumulation during the minority of any person who, under the trusts of the will, would, if of full age, be entitled to the rents and profits, do not permit accumulation during the period before the birth of such person. *Haley v. Bannister*, 4 Mad. 275; *Ellis v. Maxwell*, 8 B. 596.

And it has been doubted, whether these words would authorise an accumulation during the minority of a person not born at the date of the death, but if not, they are superfluous. *Bryan v. Collins*, 16 B. 14; see *Peard v. Kekewich*, 15 B. 166.

Accumulation  
under deed.

Where a fund is settled by deed on trust to accumulate during the joint lives of A. and B., the accumulation is valid only during so much of the joint lives as expires during the settlor's life. *In re Lady Rosslyn's Trust*, 16 Sim. 391; *Jagger v. Jagger*, 25 Ch. D. 729.

Where policies on several lives were settled with a direction to accumulate the moneys received therefrom until all the policies should have fallen in, it was held that the accumulation was valid only for the period commencing when the first policy fell in and ending with the settlor's death. *Re Errington; Errington-Turbutt v. Errington*, 76 L. T. 616.

Accumulation  
directed for  
periods longer  
than the  
statute allows  
is void only  
for the excess.

Accumulation directed within the limits of perpetuity, but beyond the limits of the statute, is void only beyond such limits. *Longdon v. Simson*, 12 Ves. 295; *Griffiths v. Iere*, 9 Ves. 127.

Where there is a direction to accumulate income with a discretionary power to apply any part of the income towards the maintenance of infants, the power of maintenance continues after the period for accumulation limited by the Thellusson Act has expired. *Pride v. Fooks*, 2 B. 430.

Accumulation  
for payment  
of debts is  
excepted from  
the statute.

An accumulation for the purpose of paying debts, whether of the testator or other persons, is excepted from the Act, and is good, whether the debts be existing or future debts. *Varlo v. Faden*, 27 B. 255; 1 D. F. & J. 211; and see *Barrington v. Liddell*, 2 D. M. & G. 505; *In re Mason; Mason v. Mason*, (1891) 8 Ch. 467.

But the payment of debts must be *bonâ fide* and the primary object of the accumulation, and therefore if debts are only

directed to be paid upon certain contingencies, and incidentally, the case is not within the exception. *Mathews v. Keble*, 4 Eq. 467 ; 3 Ch. 691.

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And it seems that if accumulation of income is directed to pay debts a direction to continue the accumulation in order to recoup corpus if the debts should be paid out of corpus would be void. *Tewart v. Lawson*, 18 Eq. 490.

The second exception is of portions for the children of the testator, or any person taking any interest under the will.

What are  
portions  
within the  
exception.

The children must be children either of the testator or of a person taking an interest under the will, and therefore if the accumulations are given to a class of children, some of whose parents take nothing under the will, the exception does not apply. *Eyre v. Marsden*, 2 Kee. 564.

But the interest taken by the parent under the will need not be an interest in the fund to be accumulated. *Burt v. Sturt*, 10 Ha. 423 ; *Barrington v. Liddell*, 2 D. M. & G. 480, 500.

And any interest, however small, given to the parent is sufficient. *Barrington v. Liddell*, 2 D. M. & G. 480, 505 ; *Evans v. Hellier*, 5 Cl. & F. 126.

As to what are portions within the exception :—

A fund to be accumulated and given to such children as may be living at the time when the accumulations are to cease, is not within the exception. *Burt v. Sturt*, 10 Ha. 415 ; *Drewett v. Pollard*, 27 B. 196.

A fund to be  
accumulated  
and given to  
children  
living at the  
period of  
distribution  
is not a  
portion.

Nor are accumulations to be added to capital and given to a child or to the members of a family. *Edwards v. Tuck*, 3 D. M. & G. 40 ; *Morgan v. Morgan*, 4 De G. & S. 175 ; 20 L. J. Ch. 441 ; *Wildes v. Davies*, 1 Sm. & G. 475 ; *Bourne v. Buckton*, 2 Sim. N. S. 91 ; *Jones v. Maggs*, 9 Ha. 605 ; *Mathews v. Keble*, 4 Eq. 467 ; 3 Ch. 691 ; *Re Walker* ; *Walker v. Walker*, 54 L. T. 792.

Nor is a fund directed to be accumulated and given to a parent for life with remainder to her children. *Watt v. Wood*, 2 Dr. & Sm. 56. *Middleton v. Losh*, 1 Sm. & G. 61, seems irreconcilable with the other decisions, unless it can be

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supported on the ground that the provision was called a portion; see 10 Ha. 426.

And where a fund directed to be given to children consists of a capital sum of personalty and the accumulations thereof, to which the rents of realty are added, the aggregate fund cannot be separated so as to make the gift of the accumulated rents good as a portion. *Re Walker; Walker v. Walker*, 54 L. T. 792.

Accumulation  
to pay portions  
charged by  
another  
instrument.

Portions given  
by the will  
itself.

But a direction to accumulate a sum to pay portions charged by another instrument is within the exception. *Halford v. Stains*, 16 Sim. 488; *Barrington v. Liddell*, 2 D. M. & G. 480, 498.

And the exception extends also to portions created by the will itself. *Beech v. Lord St. Vincent*, 3 De G. & S. 678; 3 Jur. N. S. 762.

And when an accumulation is directed to raise portions for children if there are any, and if not for some other purpose, the case is within the exception only in the former event. *Re Chulow's Trust*, 1 J. & H. 639.

Legatee  
having a  
vested right  
may stop  
accumulation  
when he  
attains 21.

Where there is an absolute vested gift made payable at a future event with direction to accumulate the income in the meantime and pay it with the principal, the Court will not enforce the trust for accumulation, in which no person has any interest but the legatee. *Saunders v. Vautier*, 4 B. 115; Cr. & Ph. 240; *Gosling v. Gosling*, Johns. 265; *Corentry v. Corentry*, 2 Dr. & S. 470.

Case of  
charities.

The same principle applies to a charity whether corporate or unincorporate. *Wharton v. Masterman*, (1895) A. C. 186.

But where the accumulation is invalid, not because it is an attempted fetter upon an absolute interest, but merely because it is struck at by the Thellusson Act, *i.e.*, where other persons than the legatee have an interest in the accumulations, then, so far as the accumulation extends beyond the statutory period, the income is undisposed of. *Talbot v. Jerers*, 20 Eq. 255; *Weatherall v. Thornburgh*, 8 Ch. D. 261; *Re Parry; Powell v. Parry*, 60 L. T. 489.

The same result follows, though there is no express trust to accumulate, if a residue is given after the death of annuitants. *Re Hiscoe; Hiscoe v. Waite*, 48 L. T. 510.

When property is given absolutely in the first place, and a direction is afterwards added to accumulate, the accumulations, so far as they are void by the statute, go to the person to whom the absolute interest is given. *Trickey v. Trickey*, 3 M. & K. 560; *Combe v. Hughes*, 34 B. 127; 2 D. J. & S. 657.

And where an estate is devised subject to a trust for accumulation which is void, the trust sinks for the benefit of the persons for the time being entitled to the estates. *Evans v. Hellier*, 1 M. & Cr. 135; 5 Cl. & F. 114; *Re Chulow's Trust*, 1 J. & H. 639.

But the effect of the statute is not to accelerate any gifts in the will. *Green v. Gascoyne*, 4 D. J. & S. 565.

Therefore accumulations released by the statute, if the fund to be accumulated is not a residue, in the case of personalty fall into the residue. *Ellis v. Maxwell*, 3 B. 587; *A.-G. v. Poulden*, 3 Ha. 555; *Jones v. Maggs*, 9 Ha. 605; *Re Parry*; *Powell v. Parry*, 60 L. T. 489.

In the case of realty the residuary devisee or heir is entitled according as the will is governed by the Wills Act or not. *Smith v. Lomas*, 32 L. J. Ch. 578.

If the fund to be accumulated is residuary, the void accumulations go to the heir or next of kin, according to the nature of the property, and if the fund is mixed, to the heir and next of kin proportionately. *Green v. Gascoyne*, 4 D. J. & S. 565; *Halford v. Stains*, 16 Sim. 488; *Eyre v. Marsden*, 2 Kee. 564; 4 M. & Cr. 231; *Wildes v. Davies*, 1 Sm. & G. 475; *Ralph v. Carrick*, 5 Ch. D. 984; 11 Ch. D. 873; see *Elborne v. Goode*, 14 Sim. 165.

There is some doubt whether the income accruing after the end of the statutory period upon the fund and upon the accumulations is capital or income of the residue, as between tenant for life and remainderman. In *Crawley v. Crawley*, 7 Sim. 427; and *O'Neill v. Lucas*, 2 Kee. 313, 316, such income was held to be capital; but this was not followed in *In re Phillips*; *Phillips v. Levy*, 49 L. J. Ch. 198; 28 W. R. 40 (Malins, V.-C.); and may not be consistent with *Morgan v. Morgan*, see *infra*.

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Destination of  
excessive  
accumulation.

Accumula-  
tions released  
by the statute  
pass to the  
heir or next  
of kin, as the  
case may be,  
or to the  
residuary  
legatee if  
there is one.

Accumula-  
tions of  
residue.

Whether  
income of  
accumulation  
after 21 years  
is capital or  
income.

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Where there is a gift to A. when she marries, with all accumulations of interest in the meantime, and A. dies unmarried, the tenant for life of the residue is entitled to the accumulations which have been made during her life, and within the period allowed for accumulation.

After the period allowed for accumulation, and until the legacy is payable or fails, the income of so much as was accumulated during the life of a tenant for life of the residue, belongs to him or his estate, and the income of the rest belongs to the remainderman. *Morgan v. Morgan*, 20 L. J. Ch. 109, 441; not so well reported in 4 De G. & S. 164; 15 Jur. 319.

A legacy with accumulations of interest was given to the eldest daughter of A. to be paid at twenty-one, and if there should be no daughter of A., to the eldest daughter of B., payable in like manner. The testatrix died in 1819. A. never had a daughter, and died in 1851. B. had a daughter born in 1821, who died in 1827. It was held that the legal personal representatives of B.'s daughter were entitled to the legacy and accumulations down to 1827, with interest thereon at 4 per cent. until payment, and that the residuary legatee took all the rest of the accumulations. *Bryan v. Collins*, 16 B. 14.



## CHAPTER XXXVII.

## CONDITIONS SUBSEQUENT.

IN the case of conditions subsequent, if the condition is impossible, impolitic, or illegal, the gift remains, though there may be a gift over upon non-performance of the condition. *Thomas v. Howell*, 1 Salk. 170; *Egerton v. Earl Brownlow*, 4 H. L. 1; *Wilkinson v. Wilkinson*, 12 Eq. 604; *Graydon v. Hicks*, 2 Atk. 16; *Jones v. Suffolk*, 1 B. C. C. 528; *Collett v. Collett*, 35 B. 312; *Sutcliffe v. Richardson*, 13 Eq. 606; *Yates v. University of London*, L. R. 7 H. L. 438; and see *Wedgwood v. Denton*, 12 Eq. 290.

A condition must be so framed that it may be capable of ascertainment at any moment whether it has or has not taken effect. Thus, where a bequest of chattels to the owner of a title was followed by a direction that no person was to take an absolute interest till the expiration of twenty-one years after the death of all persons living at the testator's death and afterwards attaining the title, the direction was held void for uncertainty. *In re Viscount Exmouth; Viscount Exmouth v. Praed*, 23 Ch. D. 158.

A condition subsequent requiring the consent of several persons becomes impossible and is discharged by the death of all, or even of one of them, though in the latter case it would seem the condition is satisfied by the consent of the survivors. *Peyton v. Bury*, 2 P. W. 625; *Grant v. Dyer*, 2 Dow, 73; *Jones v. Suffolk*, 1 B. C. C. 528; *Aislalie v. Rice*, 3 Mad. 256; see *Dawson v. Oliver Massey*, 2 Ch. D. 753.

Where the consent of guardians is required and the testator appoints no guardians, an application should be made to the

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Conditions subsequent, impossible, impolitic, or illegal, are ineffectual whether there is a gift over or not.

Condition requiring consent of several persons becomes impossible by death of some.

Consent of guardians.

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Court for the appointment of guardians, and the consent of a guardian appointed by the infant would not be sufficient. *In re Brown's Will*, 18 Ch. D. 61.

So where the consent of parents or guardians is required and the parents are dead, guardians must be appointed to give their consent. *Ib.*

Condition not performed through ignorance takes effect,

A condition subsequent not performed owing to the ignorance of the legatee of its existence, nevertheless works a forfeiture, where the property is given over, whether in the case of personalty or of realty. *Porter v. Fry*, 1 Vent. 197; *Carter v. Carter*, 3 K. & J. 617; *Hodges' Trusts*, 16 Eq. 92; *Astley v. Earl of Essex*, 18 Eq. 290.

unless the devisee is heir.

But this does not apply, where the devisee is the heir who has a title independent of the will. *Doe d. Kenrick v. Lord Beauclerk*, 11 East, 667; *Doe d. Taylor v. Crisp*, 8 Ad. & E. 778; *Murphy v. Lincham*, 1 R. 9 C. L. 123.

Condition forfeiting a legacy if not claimed.

So when there is a clause forfeiting a legacy, if not claimed within a given time, the forfeiture takes effect, if the legacy is not claimed, though the legatee received no notice of the legacy or of the death of the testator. *Burgess v. Robinson*, 3 Mer. 7; *Tulk v. Houlditch*, 1 V. & B. 248; *Powell v. Rawle*, 18 Eq. 243.

What amounts to a claim.

It has been held that the filing of a bill for the administration of the estate before the time appointed is equivalent to a claim by the legatees, though they may not be parties to the suit. *Tollner v. Marriott*, 4 Sim. 19.

But when the gift was to persons who should within a year establish their title as next of kin, an order made shortly after the testator's death on originating summons directing inquiries as to the persons entitled was held not to let in next of kin who made no claim within the year. *In re Hartley*; *Stedman v. Dunster*, 34 Ch. D. 742.

As regards a condition to return to England and claim a legacy within a given time such a condition is not discharged by the death of the legatee within the time (a), nor by his embarkation for England when the ship is wrecked and the legatee drowned (b), but it is discharged by the lunacy of the legatee (c). *Tulk v. Houlditch*, 1 V. & B. 248 (a condition precedent, however) (a); *Priestley v. Holgate*, 3 K. & J. 286 (b);

*In re Bird*; *Bird v. Cross*, 8 R. 326 (c). See, too, *In re Arbib & Class*, (1891) 1 Ch. 601.

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In the case of realty a valid condition subsequent is effectual even where there is no gift over. *Cooke v. Turner*, 15 M. & W. 727; 14 Sim. 493; 15 Sim. 611; 16 Sim. 482; and see *Evanturel v. Evanturel*, L. R. 6 P. C. 1.

A condition is effectual without a gift over in the case of realty.

In *Cooke v. Turner* there was a gift over, but the case seems to have been decided at common law independently of the gift over.

And a condition subsequent may operate to destroy a contingent, as well as to divest a vested estate. *Egerton v. Earl Brownlow*, 4 H. L. 1.

With regard to personalty, a condition subsequent is effectual without a gift over, except as far as the rules of the civil law have been adopted with regard to certain classes of conditions, see *post*, p. 546. *In re Dickson's Trust*, 1 Sim. N. S. 97; *Craven v. Brady*, 4 Eq. 209; 4 Ch. 296.

Personalty follows the rule as modified by the doctrine of *in terrorem*.

As to what conditions are valid, it has been said that nothing can be made the subject of a condition in a will, which could not be made the subject of a contract or wager in life. See per the Lord Chief Baron, *Egerton v. Earl Brownlow*, 4 H. L. 1, p. 150. In that case a condition defeating an estate if Lord Alford, the tenant for life, should die without having acquired the title of Duke or Marquis of Bridgewater was held void.

Test of validity of a condition.

A gift over in the event of a change of religion by the legatee is valid. *Hodgson v. Halford*, 11 Ch. D. 959.

Change of religion.

Conditions requiring the separation of husband and wife are invalid, for instance, conditions decreasing an annuity if the annuitant again lives with her husband, or increasing a legacy to a husband in the event of a separation from his wife. *Bean v. Griffiths*, 1 Jur. N. S. 1045; *Cartwright v. Cartwright*, 3 D. M. & G. 982; *Wilkinson v. Wilkinson*, 12 Eq. 604.

Separation of husband and wife.

A limitation to endure during the separation of husband and wife is wholly void. *In re Moore*; *Trafford v. Maconochie*, 39 Ch. D. 116.

A condition not to dispute a will is valid in law if the will is unsuccessfully disputed, though it will not avail to make an

Condition not to dispute a will.

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invalid disposition good. *Cooke v. Turner*, 15 M. & W. 727; *Eranturel v. Eranturel*, L. R. 6 P. C. 1; *Sterenson v. Abingdon*, 11 W. R. 985; see *Warbrick v. Varley*, 80 B. 847; *Hope v. International Financial Society*, 4 Ch. D. 827; *Phillips v. Phillips*, W. N. 1877, 260; *Massy v. Rogers*, 11 L. R. Ir. 409.

On the other hand, a condition not to institute legal proceedings touching the estate and effects devised, is too general, and is bad. *Rhodes v. Muswell Hill Land Co.*, 29 B. 561.

A clause forfeiting an annuity if the annuitant should interfere or attempt to interfere in the management of the testator's estate is good, and takes effect if the annuitant brings an action against the trustees without reasonable cause. *Adams v. Adams*, 45 Ch. D. 426; (1892) 1 Ch. 369.

A condition that trustees shall not pay over the shares of legatees without taking from them bonds, that they will not intermarry or illegally cohabit with certain persons, will not be enforced. *Poole v. Bott*, 11 Ha. 33.

Computation  
of time.

As to the rules for computing time, within which a condition is required to be performed, see *Lester v. Garland*, 15 Ves. 248; *Miller v. Wheatley*, 28 L. R. Ir. 144.

#### CONDITIONS IN RESTRAINT OF MARRIAGE.

A condition in restraint of marriage applies only to a lawful marriage. *In re M'Laughlin*, 1 L. R. Ir. 42.

Condition  
subsequent in  
restraint of  
marriage is  
good in realty.

A condition subsequent in restraint of marriage, where the estates are for life or in fee, is, it seems, valid as regards realty. *Jones v. Jones*, 1 Q. B. D. 279; *Bellairs v. Bellairs*, 18 Eq. 510.

But not as  
regards an  
estate tail.

But such a condition is void, if imposed upon a tenant in tail, as repugnant to the estate. *Earl of Arundel's Case*, 3 Dyer, 342b.

Condition in  
restraint of  
marriage is  
void in per-  
sonalty.

It is clear that, in the case of personalty, a condition subsequent in general restraint of marriage is void, whether the condition forfeits or only reduces the gift. *Morley v. Rennoldson*, 2 Ha. 570; (1895) 1 Ch. 449; *Re Bellamy*; *Pickard v. Holroyd*, 48 L. T. 212.

And a condition in restraint of marriage, may be so

restrictive as to be equivalent to a general restraint; for instance, if it prohibits marriage with any person not seised of an estate in fee of the clear yearly income of 500*l.* a year. *Keilly v. Monck*, 3 Ridg. P. C. 205.

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The same rule applies to a mixed fund arising from the proceeds of sale of realty and pure personalty. *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Bellairs v. Bellairs*, 18 Eq. 510.

Mixed fund.

It would seem that the rule applies to real and personal estate given together. *Duddy v. Gresham*, 2 L. R. Ir. 443.

And it seems, that a legacy out of the proceeds of land directed by the testator to be converted would follow the same rule. See *In re Hart's Trusts*, 3 De G. & J. 195; *Bellairs v. Bellairs*, *supra*.

Legacy out of  
proceeds of  
sale of land.

On the other hand, a limitation to a person till marriage is good, the intention being to provide for the person while he remains unmarried, and not to prevent him from marrying. *Potter v. Richards*, 24 L. J. Ch. 488; *Heath v. Lewis*, 3 D. M. & G. 954; *In re King's Trusts*, 29 L. R. Ir. 401.

Limitation ill  
marriage is  
good.

In such a case if the legatee marries in the testator's lifetime, even with his consent, the gift does not take effect. *Bullock v. Bennett*, 7 D. M. & G. 283; *Andrew v. Andrew*, 1 Coll. 690; *In re King's Trusts*, 29 L. R. Ir. 401.

But there may be enough to show that the marriage contemplated is a marriage after the testator's death, as in *Cooper v. Cooper*, 6 Ir. Ch. 217, where there was a gift to a lady till marriage, and the testator then married the lady and republished his will by a codicil.

Conditions in partial restraint of marriage are valid, both with regard to realty and personalty, though with regard to the latter the further question arises whether they are *in terrorem* or not.

Conditions in  
partial  
restraint of  
marriage are  
good though  
they may be  
ineffectual.

Thus, conditions restraining a widow or widower, whether of the person making the will or of a stranger, from marrying again: *Evans v. Rosser*, 2 H. & M. 190; *Newton v. Marsden*, 2 J. & H. 356; *Allen v. Jackson*, 1 Ch. D. 399; or requiring a marriage with consent: *Sutton v. Jewks*, 2 Ch. Rep. 95; or restraining marriage before a certain age: *Stackpole v. Beaumont*, 3 Ves. 89, are good as conditions, though they

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may be ineffectual if there is no gift over, on the principle hereafter mentioned.

So conditions against marriage with a Scotchman (a), or in a manner not in accordance with the rules of the Quakers (b), or with a Papist (c), or a person not being a Jew (d), or not being a Protestant and of Protestant parents (e), or a domestic servant (f), or if the legatee marries beneath her (g), are valid. *Perrin v. Lyon*, 9 East, 170 (a); *Haughton v. Haughton*, 1 Moll. 611 (b); *Duggan v. Kelly*, 10 Ir. Eq. 295, 473 (c); *Hodgson v. Halford*, 11 Ch. D. 959 (d); *In re Knox*, 23 L. R. Ir. 542 (e); *Jenner v. Turner*, 16 Ch. D. 188 (f); *Greene v. Kirkwood*, (1895) 1 Ir. 180 (g).

In the case of real estate such conditions are valid even if there is no gift over. *Haughton v. Haughton*, 1 Moll. 611.

Doctrine of  
in *terrorem*.

In the case of personality, and possibly in the case of realty and personality given together (*Duddy v. Gresham*, 2 L. R. Ir. 443), certain conditions subsequent, though good in law, are, in accordance with the rule of the Civil Law, held to be void, and *in terrorem* merely, if there is no gift over.

Of this nature are the conditions in partial restraint of marriage already mentioned. *Marples v. Bainbridge*, 1 Mad. 590; *Reynish v. Martin*, 3 Atk. 380; *Wheeler v. Bingham*, 1 Wils. 135; 3 Atk. 364; *W. v. B.*, 11 B. 621.

And the same rule applies to a condition not to contest the will. *Powell v. Morgan*, 2 Vern. 90.

But if there is a gift over, these conditions are effectual, the gift over being considered sufficient evidence, that they were not meant to be *in terrorem* merely. *Cleaver v. Spurling*, 2 P. W. 526; *Tricker v. Kingsbury*, 7 W. R. 652; *Charlton v. Coombes*, 11 W. R. 1038; *Craven v. Brady*, 4 Eq. 209; 4 Ch. 296.

#### MISCELLANEOUS CONDITIONS.

Apportion-  
ment of con-  
dition.

Where a testator directs, that if a certain sum should be applied in favour of A., A. should apply a sum of different amount in favour of B., the condition will be compulsory on A. only if the whole of the sum in question is applied in his favour, and the condition will not be apportioned. *Caldwell v. Cresswell*, 6 Ch. 279; *Fazakerley v. Ford*, 4 Sim. 390.

A condition requiring a release within a given time, with a gift over, if the release is not given within the time, must be literally complied with. *Simpson v. Vickers*, 14 Ves. 341, 348.

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Condition  
requiring a  
release.

But if there is no gift over, a release given within a reasonable time will satisfy the condition. *Simpson v. Vickers*, 14 Ves. 341; *Taylor v. Topham*, 1 B. C. C. 168; *Paine v. Hyde*, 4 B. 468; *Hollinrake v. Lister*, 1 Russ. 506; see *Scarlett v. Lord Abinger*, 34 B. 398; *Ledward v. Hassels*, 2 K. & J. 370.

A legacy given on condition of conveying real estate to a third person gives a legatee who has conveyed no lien upon the land for the legacy. *Barker v. Barker*, 10 Eq. 498.

A condition of forfeiture, if legatees cease to carry on the testator's business, takes effect if they sell it to a company, although they become managing directors and in substance sole shareholders of the company. *In re Sax*; *Barned v. Sax*, 62 L. J. Ch. 688; 68 L. T. 849; 41 W. R. 584; 3 R. 688.

Ceasing to  
carry on  
business.

"Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine." *Clarering v. Ellison*, 7 H. L. 707, p. 725.

Condition  
must be clear.

Upon this principle conditions requiring a beneficiary to "live and reside" in a mansion-house (a), and requiring children to be educated in England and in the Protestant religion (b) have been held too uncertain to be effective. *Fillingham v. Bromley*, T. & R. 530 (a); *Clarering v. Ellison*, 7 H. L. 707 (b).

Conditions as  
to residence  
and education.

But such conditions if penned with sufficient particularity can be made effectual.

A condition requiring a person to "reside and dwell" in a mansion-house has been held good against a person who declared her intention not to live there at all. *Dunne v. Dunne*, 7 D. M. & G. 207.

"Reside and  
dwell"

A condition of residence imports personal presence, but it may be satisfied by keeping up an establishment at the house and visiting it occasionally without passing the night there.

What residence  
implies.

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*Walcot v. Botfield*, Kay, 534; *Tagore v. Tagore*, 1 Ind. App. 387; *In re Moir*; *Warner v. Moir*, 25 Ch. D. 605; see *Wynne v. Fletcher*, 24 B. 430.

Condition  
inapplicable  
to infant.

A condition defeating an estate if the taker refuses or neglects to do something, for instance, to reside in a mansion-house, does not apply to an infant who cannot be said to refuse or neglect to reside. *Parry v. Roberts*, 19 W. R. 1000; *Beran v. Mahon-Hagan*, 27 L. R. Ir. 399; 31 *ib.* 342; *Partridge v. Partridge*, (1894) 1 Ch. 351.

Effect of s. 51  
of Settled  
Land Act.

The effect of sect. 51 of the Settled Land Act, 1882, upon conditions of residence is, that the tenant for life may sell and enjoy the income of the proceeds notwithstanding the condition, but if he does not sell he must perform the condition. *In re Paget's Settled Estates*, 30 Ch. D. 161; *In re Haynes*; *Kemp v. Haynes*, 37 Ch. D. 306; see *In re Edwards' Settlement*, (1897) 2 Ch. 412.

Name and  
arms clause.

With regard to name and arms clauses a name can be assumed by any one, even by an infant, without any licence or authority, and therefore such assumption is sufficient unless the testator requires some other formality. *Doe d. Lascombe v. Yates*, 5 B. & Ald. 544; *Davies v. Lowndes*, 1 Bing. N. C. 618; *Beran v. Mahon-Hagan*, 27 L. R. Ir. 399; 31 *ib.* 342.

And unless the name is to be assumed as a surname it is sufficient if the devisee has the name whether as a christian name or a surname. *Bennett v. Bennett*, 2 Dr. & S. 266.

If a surname is to be assumed, it may be assumed after, but not before, the beneficiary's own surname; but if it is to be assumed "alone or together" with the beneficiary's family name, it may be assumed before or after the family name. *D'Eyncourt v. Gregory*, 1 Ch. D. 441; *In re Eversley*; *Mildmay v. Mildmay*, (1900) 1 Ch. 96.

It appears not to be settled whether a person can assume arms without a grant from the Heralds' College. See Davidson, *Prec.*, vol. 3, p. 361, n.; *Beran v. Mahon-Hagan*, 27 L. R. Ir. 399, p. 411; 31 *ib.* 342, p. 356.

But where the condition requires the beneficiary to use his best endeavours to obtain a grant of arms, the condition is not broken if he obtains a grant from the Heralds' College, though



the arms granted are not the identical arms of the testator.  
*Austen v. Collins*, 54 L. T. 908.

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For a provision requiring a beneficiary to enter on a calling, see *Galwey v. Barden*, (1899) 1 Ir. 508.

Entering on  
a calling.

And for a condition requiring a charity to obtain from the public an amount equal to the legacy left by the testator, see *In re Glubb*; *Bamfield v. Rogers*, (1900) 1 Ch. 354.

# REPUGNANT CONDITIONS.

Conditions repugnant to the estate previously given are void.  
*In re Dugdale*; *Dugdale v. Dugdale*, 38 Ch. D. 176; *Corbett v. Corbett*, 13 P. D. 136; 14 P. D. 7.

Thus, conditions in general restraint of alienation are bad, if absolute interests have been given in the first place.

Restraints  
upon aliena-  
tion.

1. Where there is a devise in fee, followed by an absolute restraint upon alienation, the restraint is void for repugnancy.  
Co. Litt. 222b; *Hood v. Oglander*, 34 B. 513.

Unlimited  
restraint.

But a condition that the feoffee shall not alien "to such a one, naming his name, or to any of his heires, or of the issues of such a one, &c., or the like," is said to be good. Co. Litt. 223a.

Limited  
restraint on  
alienation.

Upon this principle, conditions not to sell, except to a sister or sisters or their children, and not to sell out of the family, have been held valid. *Doe d. Gill v. Pearson*, 6 East, 178; *Re Macleay*, 20 Eq. 186; see *Ludlow v. Bunbury*, 35 B. 36; *Billing v. Welch*, 1 R. 6 C. L. 88; see the principle discussed in *In re Rosher*; *Rosher v. Rosher*, 26 Ch. D. 801.

But a condition not to sell except to one person is bad, since a person might be selected who would be certain not to purchase. *Muschamp v. Bluett*, Bridg. 137; *Attwater v. Attwater*, 18 B. 330.

And conditions that, if the devisee in fee should wish to sell in the lifetime of the testator's wife, she should have the option of purchasing at a price, which was about one-fifth of the value of the estate, and that upon any sale the devisee is to pay a legacy out of the proceeds, have been held to be bad. *In re Rosher*; *Rosher v. Rosher*, 26 Ch. D. 801; *In re Elliot*; *Kelly v. Elliot*, (1896) 2 Ch. 353.

*In re Rosher* also decides, that a restraint upon alienation is

Alienation  
limited in  
time.

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bad though limited in point of time. Upon this question, see, too, *Renaud v. Tourangeau*, L. R. 2 P. C. 4; *Large's Case*, 2 Leon. 82; 3 Leon. 182; 2 Jarm. 860; *Churchill v. Marks*, 1 Coll. 445; *Kiallmark v. Kiallmark*, 26 L. J. Ch. 1; *In re Dugdale*; *Dugdale v. Dugdale*, 38 Ch. D. 176; *Corbett v. Corbett*, 13 P. D. 136; 14 P. D. 7.

Alienation by particular form of conveyance.

In the same way, conditions restraining alienation by any particular form of conveyance, as by charge or mortgage, are bad. *Willis v. Hiscox*, 4 M. & Cr. 201; *Ware v. Cann*, 10 B. & Cr. 433.

Thus, a gift over of so much land as an absolute owner charges or incumbers would be bad. *Willis v. Hiscox*, *supra*.

The effect of the Settled Land Act, 1882, sect. 51, upon conditions in restraint of alienation must also be borne in mind. *In re Ames*; *Ames v. Ames*, (1893) 2 Ch. 479; *Re Sudbury & Pointon Estates*; *Vernon v. Vernon*, 68 L. T. 707. See p. 548.

Direction not to raise rents.

Directions that the rents upon property devised are not to be raised have been held invalid. *A.-G. v. Catherine Hall*, Jac. 381; *A.-G. v. Greenhill*, 33 B. 193.

Gift over of personalty on alienation.

These rules apply to personalty, so that if an absolute interest is given (a), or even a life interest with a power of disposition by deed or will (b), a gift over if the legatee disposes of his interest is void. *Bradley v. Peixoto*, 3 Ves. 324; *In re Jones's Will*, 23 L. T. 211; *Metcalf v. Metcalf*, 43 Ch. D. 633; *In re Bourke's Trusts*, 27 L. R. Ir. 573 (a); *Re Wolstenholme*; *Marshall v. Aizlewood*, 43 L. T. 752 (b).

Gift over on alienation before time of distribution.

It is, however, clear that absolute interests, whether vested or contingent, may be given over upon alienation before the time of possession. *Kearsley v. Woodcock*, 3 Ha. 185; *Re Payne*, 25 B. 556; *Pearson v. Dolman*, 3 Eq. 315; *In re Porter*; *Coulson v. Capper*, (1892) 3 Ch. 481.

Defeasance on bankruptcy.

2. A condition giving over an estate in fee on bankruptcy of the devisee is void. *In re Machu*, 21 Ch. D. 838; *In re Dugdale*; *Dugdale v. Dugdale*, 38 Ch. D. 176.

Gift over if legatee dies intestate.

3. A gift over, if a devisee or legatee to whom an absolute interest is given does not dispose of his interest or dies intestate, or dies before selling his interest, is void both as regards realty and personalty. *Gulliver v. Vaux*, 8 D. M. & G. 167, n.; *Holmes v. Godson*, 8 D. M. & G. 152; *Barton v. Barton*, 3

K. & J. 512; *Lightbourne v. Gill*, 3 B. P. C. 250; *Re Mortlock's Trusts*, 3 K. & J. 456; *Re Yalden*, 1 D. M. & G. 58; *Watkins v. Williams*, 3 Mac. & G. 622; *Henderson v. Cross*, 29 B. 216; *Perry v. Merritt*, 18 Eq. 152; *In re Wilcocks's Settlement*, 1 Ch. D. 229; *In re Jenkins' Trusts*, 23 L. R. Ir. 162; *Stretton v. Fitzgerald*, 23 L. R. Ir. 310, 466; *Parnell v. Boyd*, (1896) 2 Ir. 571.

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So a direction following a devise to tenants in common in fee that if no distribution should be made during the lives of the tenants in common the property should devolve to their children is invalid. *Shaw v. Ford*, 7 Ch. D. 669.

Such conditional gifts over are good according to Scotch law. *Barstow v. Pattison*, L. R. 1 H. L. Sc. 392.

After a devise to A. and his heirs, a gift over if A. shall die without leaving lawful issue to his next heir-at-law is void. *In re Parry & Daggs*, 31 Ch. D. 130; see *Gulliver v. Vaux*, 8 D. M. & G. 167, n.

It has been held that a gift over if the legatee does not dispose of his interest does not become valid by his death in the testator's lifetime. *Hughes v. Ellis*, 20 B. 193; *Greated v. Greated*, 26 B. 621. These cases were followed in *In re Jenkins' Trusts*, 23 L. R. Ir. 162; but they were doubted in *In re Stringer*, 6 Ch. D. 1, and disapproved, if not directly overruled, in *In re Lowman*; *Devenish v. Pester*, (1895) 2 Ch. 348.

4. A gift over in the event of a previous gift being void at law or in equity is good. *De Themmines v. De Bonneval*, 5 Russ. 288.

Gift over if  
previous gift  
is void.

5. A tenant in tail cannot by condition subsequent be prevented from barring his estate tail. *Dawkins v. Lord Penrhyn*, 4 App. C. 51; see *Milbank v. Vane*, (1893) 3 Ch. 79.

Condition not  
to bar entail.

A condition intended to determine an estate tail in part only, for instance, a clause directing that the interests of tenants in tail shall cease as concerns the rights and interests of the person making default, but not farther or otherwise, is void. *Seymour v. Vernon*, 10 Jur. N. S. 487; 12 W. R. 729.

Condition  
determining  
an estate tail  
in part.

A condition in certain events determining estates tail, as if the tenant in tail were dead, will be made good by supplying

Estate tail to  
cease as if the  
tenant in tail  
were dead.

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Absolute  
interest  
directed to  
cease as if the  
donee were  
dead.

the words dead without issue. *Astley v. Earl of Essex*, 18 Eq. 290.

But, if an absolute interest has been given, such a condition will be ineffectual, since the legatee's interest would not determine with his death, and, therefore, the interest directed to cease is not the exact interest previously given. *Bird v. Johnson*, 18 Jur. 976; *Catt's Trusts*, 2 H. & M. 46; 38 L. J. Ch. 495; *Musgrave v. Brooke*, 26 Ch. D. 792. See *In re Cornwallis*; *Cornwallis v. Wykeham-Martin*, 32 Ch. D. 388.

Conditions  
postponing  
enjoyment  
beyond 21.

6. So, two, when vested interests have once been given, restrictions postponing the enjoyment of the property beyond the age of twenty-one are void, unless the property is otherwise disposed of in the meantime. *Saunders v. Vautier*, Cr. & Ph. 240; *Rocke v. Rocke*, 9 B. 66; *Re Young's Settlement*, 18 B. 199; *Gosling v. Gosling*, Johns. 265; *Wharton v. Masterman*, (1895) A. C. 186.

Embracing  
religious life.

7. A provision cutting down legacies if the legatees should embrace a religious life has been held to be repugnant and void. *In re Thompson*; *Griffith v. Thompson*, 44 W. R. 582.

#### FORFEITURE ON ALIENATION, BANKRUPTCY, &c.

Meaning of  
the term  
alienation.

Where property is given over upon alienation the term includes only voluntary alienation, and not a hostile bankruptcy. *Lear v. Leggett*, 1 R. & M. 690; *Pym v. Lockyer*, 12 Sim. 394; *Graham v. Lee*, 23 B. 388; *Re Kelly's Settlement*; *West v. Turner*, 59 L. T. 494; *Re Harrey*; *Ex parte Pixley v. Harrey*, 60 L. T. 710; 37 W. R. 620; see *Cooper v. Wyatt*, 5 Mad. 482.

But the presentation of a petition by the legatee under the Insolvent Debtors' Act, or under the arrangement clauses of the Bankruptcy Act, 1869, is a voluntary alienation. *Shee v. Hale*, 13 Ves. 404; *Brandon v. Aston*, 2 Y. & C. C. 24; *Churchill v. Marks*, 1 Coll. 441; *Martin v. Margham*, 14 Sim. 230; *Rockford v. Hackman*, 9 Ha. 475; *In re Amherst's Trusts*, 13 Eq. 464; see *Ex parte Dawes*; *In re Moon*, 17 Q. B. D. 275.

The execution of a warrant of attorney for a debt is not a charging within the meaning of a forfeiture clause. *Croft v. Lumley*, 6 H. L. 672; *Atison v. Holmes*, 1 J. & H. 530.

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Warrant of  
attorney.  
Income  
accrued due.

Gifts over upon alienation are directed against disposing of the property by way of anticipation; they do not, unless the language is very clearly expressed, apply to dispositions of income already accrued due. *In re Stulz's Trusts*, 4 D. M. & G. 404; *Sutton, Carden & Co. v. Goodrich*, 80 L. T. 765; see *In re Sampson*; *Sampson v. Sampson*, (1896) 1 Ch. 630.

If the property is given over if the legatee should "do or suffer," or "do or permit" anything whereby the property would be vested in another, this includes a hostile bankruptcy. *Roffey v. Bent*, 3 Eq. 759; *Ex parte Elyton*; *In re Throckmorton*, 7 Ch. D. 145.

"Do or  
suffer."

Under similar words the issue of a writ of sequestration against the legatee has been held to work a forfeiture. *Dixon v. Rowe*, 35 L. T. 549.

A gift over if the legatee does or suffers something whereby the property would "become payable to or vested in" another includes a receiving order in bankruptcy (a) but not a Scotch sequestration (b), nor an adjudication in bankruptcy in New Zealand of a domiciled Englishman (c). *In re Sartoris's Estate*; *Sartoris v. Sartoris*, (1892) 1 Ch. 11; see *Ex parte Dawes*; *In re Moon*, 17 Q. B. D. 275 (a); *Re James*; *Clutterbuck v. James*, 62 L. T. 454 (b); *In re Hayward*; *Hayward v. Hayward*, (1897) 1 Ch. 905 (c). See also *In re Brewer's Settlement*; *Morton v. Blackmore*, (1896) 2 Ch. 503.

"Payable to  
or vested in."

A gift over upon alienation takes effect if the legatee executes a charge which is accepted by the incumbrancer, though upon hearing of the forfeiture clause he disclaims the charge. *Hurst v. Hurst*, 21 Ch. D. 278.

(Gift over on  
alienation  
takes effect  
though alienee  
afterwards  
disclaims.

But an assignment to trustees for the benefit of the legatee himself is not an assignment within such a forfeiture clause. *Lockwood v. Sikes*, 51 L. T. 562.

A clause forfeiting an annuity on an attempt to sell it takes effect if the annuitant petitions for the benefit of the Insolvent Debtors Act. *Martin v. Margham*, 14 Sim. 230.

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If legatee  
deprived or  
liable to be  
deprived.  
Attempt to  
charge.

A gift over if the legatee does or suffers anything whereby he would be deprived or liable to be deprived of the enjoyment of the property, takes effect upon presentation of a bankruptcy petition. *In re Loftus-Otway; Otway v. Otway*, (1895) 2 Ch. 235.

A gift over if the legatee should attempt to assign or charge his legacy takes effect if the legatee executes a settlement purporting to assign it, although the assignment is by law inoperative (a); but it does not take effect on his executing a document purporting to be an equitable assignment if he had no intention to create a charge by the document (b). *In re Porter; Coulson v. Capper*, (1892) 3 Ch. 481 (a); *In re Sheward; Sheward v. Brown*, (1893) 3 Ch. 502 (b); see *Re Spearman; Spearman v. Lowndes*, 82 L. T. 302.

A settlement of property to which the settlor will be entitled under A.'s will will not include a life interest given by A., but subject to forfeiture on attempted alienation. *In re Crawshay; Walker v. Crawshay*, (1891) 3 Ch. 176.

Anticipation.

A gift over on anticipating a life interest given without power of anticipation does not take effect on the execution of a mortgage during coverture. *In re Wormald; Frank v. Muzeen*, 43 Ch. D. 630.

Taking in  
execution.

A gift over if the life interest of the beneficiary "should be taken in execution by any process of law" applies to equitable execution. *Blackman v. Fysh*, (1892) 3 Ch. 209.

Deed of  
inspectorship.

The execution of a deed of inspectorship is not within a gift over in the event of the legatee taking the benefit of any Act for the relief of insolvent debtors. *Montefiore v. Enthoren*, 5 Eq. 35.

As to the meaning of alienation, see *Arison v. Holmes*, 1 J. & H. 530, p. 540.

Legal dis-  
ability.

The expression legal disability means a disability arising from act of law and does not include a disability arising from the act of the legatee. *In re Carew; Carew v. Carew*, (1896) 2 Ch. 311.

Meaning of  
insolvency.

Insolvency has no technical meaning, but means inability to pay debts. *Freeman v. Bowen*, 35 B. 17; *Re Muggeridge*, Joh. 625; 29 L. J. Ch. 288; see *De Tastet v. Le Tavernier*, 1 Kee. 161; *Billson v. Crofts*, 15 Eq. 314; *Nixon v. Ferry*, 29 Ch. D. 196.

A declaration of insolvency in S. Australia is insolvency within the meaning of a gift over upon insolvency. *Aylwin's Trusts*, 16 Eq. 585; see *In re Levy's Trusts*, 30 Ch. D. 119; *In re Broughton*; *Peat v. Broughton*, 57 L. T. 8.

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A gift over of a life interest given to the testator's widow in the event of her doing anything whereby she would be deprived of the right to receive the rents took effect under the old law upon the marriage of the widow without making any settlement. *Craven v. Brady*, 4 Eq. 209; 4 Ch. 296.

Marriage.

The execution of an irrevocable power of attorney to receive an annuity is within a clause of forfeiture in the event of assignment or disposition by way of anticipation. *Oldham v. Oldham*, 3 Eq. 404.

Power of  
attorney.

Where the property is given over upon bankruptcy, the gift over *primâ facie* includes a bankruptcy which takes place after the date of the will and is subsisting at the testator's death, notwithstanding strong words of futurity. *Yarnold v. Moorhouse*, 1 R. & M. 364; *Metcalfe v. Metcalfe*, (1891) 3 Ch. 1.

Gift over  
upon bank-  
ruptcy  
includes a  
subsisting  
bankruptcy.

And it has been held to include a bankruptcy which took place before the date of the will, and was subsisting at the death. *Manning v. Chambers*, 1 De G. & S. 282; *Seymour v. Lucas*, 1 Dr. & Sm. 177; *Trappes v. Meredith*, (No. 2) 10 Eq. 604; 7 Ch. 248; see *West v. Williams*, (1899) 1 Ch. 132.

But since the object of the gift over is merely to preserve the property from going to strangers, if the bankruptcy is annulled before any payment accrues due, the forfeiture does not take effect. *White v. Chitty*, L. R. 1 Eq. 372; *Lloyd v. Lloyd*, L. R. 2 Eq. 722; *Trappes v. Meredith*, 9 Eq. 229; *In re Parnham's Trusts*, 46 L. J. Ch. 80; 13 Eq. 413; *Samuel v. Samuel*, 12 Ch. D. 152; see *Robins v. Rose*, 43 L. J. Ch. 334; *Robertson v. Richardson*, 30 Ch. D. 623; *Re Broughton*; *Peat v. Broughton*, 57 L. T. 8; *In re Loftus-Otway*; *Otway v. Otway*, (1896) 2 Ch. 235.

A bankruptcy  
annulled be-  
fore the period  
of distribution  
will not work  
a forfeiture.

In the case of an immediate gift it appears the forfeiture will not take effect, where the bankruptcy is annulled within a year from the testator's death if there is no right to any payment till then. *Lloyd v. Lloyd*, L. R. 2 Eq. 722; *Ancona v. Waddell*, 10 Ch. D. 157.

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This principle would not apply if one of the terms of the annulment is that the dividends accruing up to that time should be paid to the assignee. *In re Parnham's Trusts*, 13 Eq. 413.

These principles have no application where the freedom from bankruptcy is a condition precedent to the vesting. *Cox v. Fonblanque*, 6 Eq. 482; see *Samuel v. Samuel*, *supra*.

Bankruptcy  
during prior  
life estate.

Similarly, if the life interest given over on bankruptcy is subject to a prior life interest, the gift over takes effect on a bankruptcy during the life of the prior tenant for life. *Sharp v. Cosserat*, 20 B. 470; *Muggeridge's Trusts*, Johns. 625.

And a gift over upon bankruptcy will carry over an accrued share directed to go in the same manner as the original share, though not accruing till after bankruptcy. *Dorsett v. Dorsett*, 30 B. 250.

Penal  
servitude.

A proviso for cesser if the beneficiary "should by his own act or by operation of law be deprived of the absolute personal enjoyment" of his interest does not take effect by the beneficiary being convicted of felony and sentenced to penal servitude. *Re Dash; Darley v. King*, 57 L. T. 219.

#### SEPARATE USE.

Separate  
estate.

Under the Married Women's Property Act, 1882 (sect. 2), every woman married since the Act may hold as her separate property, and dispose of as if she were a *feme sole*, all real and personal property belonging to her at the time of her marriage or acquired or devolving upon her after marriage.

And by sect. 5, every woman married before the Act may hold and dispose of in manner aforesaid, as her separate property, all real and personal property, the title to which accrues after the commencement of the Act.

In the cases above mentioned a married woman may take and dispose of the legal estate in land, without deed acknowledged if it is vested in her in her own right or as mortgagee, but not if it is vested in her as trustee. *In re Drummond & Darie's Contract*, (1891) 1 Ch. 524; *In re Harkness & Allsopp*, (1896) 2 Ch. 358; *In re Brooke & Fremlin*, (1898) 1 Ch. 647.



The Act does not affect the husband's right, on his wife's death, to her undisposed-of personalty, nor destroy his tenancy by the curtesy in her undisposed-of real estate. *In re Lambert's Estate*; *Stanton v. Lambert*, 39 Ch. D. 626; *Surman v. Wharton*, (1891) 1 Q. B. 491; *Hope v. Hope*, (1892) 2 Ch. 336.

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Before the Married Women's Property Act, 1882, it was settled that the corpus as well as the income of real or personal estate might be given to the separate use of a married woman. *Taylor v. Meads*, 4 D. J. & S. 607; *Cooper v. Macdonald*, 7 Ch. D. 288.

Separate use.

The separate use may of course be so framed as to apply to income or to the rents and profits only, and not to the corpus (a), or it may be limited to a particular coverture (b). *Crosby v. Church*, 3 B. 485; *Hanchett v. Briscoe*, 22 B. 496; *Troutbeck v. Boughey*, L. R. 2 Eq. 534 (a); *Shute v. Hogge*, 58 L. T. 546 (b).

In cases not within the Married Women's Property Act, 1882, the effect of the separate use as regards the capital is to give the married woman a power of disposition.

Separate use  
before the  
Married  
Women's  
Property Act,  
1882.

If the married woman does not exercise her power of disposition the separate use is exhausted, and upon her death the husband's rights revive.

Therefore, in the case of land given to the separate use of a married woman who dies without making a disposition, the husband is entitled to an estate by the curtesy. *Roberts v. Dirwell*, 1 Atk. 607; *Follett v. Tyrer*, 14 Sim. 125; *Appleton v. Rowley*, 8 Eq. 139; *Cooper v. Macdonald*, 7 Ch. D. 288; overruling *Heavie v. Greenbank*, 3 Atk. 675, 715, 716; 1 Ves. Sen. 298; and *Moore v. Webster*, 3 Eq. 267.

Effect of  
separate use  
on curtesy.

The case of *Bennett v. Davis*, 2 P. W. 316, is sometimes cited as an authority, that an express declaration that curtesy is not to attach to lands given to the separate use of a married woman would be effectual where no disposition is made of the lands. The question did not arise in the case, as both husband and wife were alive.

Chattels real belonging to the wife to her separate use vest in the husband, *jure mariti*, if she dies without disposing of them. *Archer v. Lavender*, 1 R. 9 Eq. 220.

Chattels real  
to separate  
use.

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XXXVII.  
Chattels in  
possession.

And it seems chattels in possession belonging to the wife to her separate use, and not disposed of, belong to the husband without the necessity of taking out administration to the wife. *Molony v. Kennedy*, 10 Sim. 254; *Bird v. Peagram*, 13 C. B. 639.

In cases not within the Married Women's Property Act, 1882, the marital right will be held to be excluded only by a clear indication of intention to exclude it.

What words  
create a  
separate use.

The word "separate" is sufficient for this purpose, whether the legatee is married or not. *Archer v. Rorke*, 7 Ir. Eq. 478.

On the other hand, such words as "own use," "absolute use," or to pay to "her own proper hands" are not enough, whether the legatee is married or single, or whether trustees are interposed or not. *Rycroft v. Christy*, 3 B. 238; *Tyler v. Luke*, 2 R. & M. 183; *Blacklow v. Laws*, 2 Ha. 49; *Taylor v. Stainton*, 2 Jur. N. S. 634; *Wills v. Sayer*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 491; *Beales v. Spencer*, 2 Y. & C. C. 651.

Disposal.

But if the legatee is married at the time and the legacy is directed to be at her own disposal, a separate use is created. *Kirk v. Paulin*, 7 Vin. Ab. 95, pl. 43; *Prichard v. Ames*, T. & R. 222; *Bland v. Dawes*, 17 Ch. D. 794.

Separate  
receipt.

Directions that the receipt of a legatee, "notwithstanding coverture," and that her "sole and separate receipt" should be a good discharge, have been held to create a separate use. *Cooper v. Wells*, 11 Jur. N. S. 923; *In re Molyneux's Estate*, I. R. 6 Eq. 411.

The same has been held where the legatee was married, and her receipt was declared to be a sufficient discharge. *Lee v. Prideaux*, 3 B. C. C. 381; *Re Lorimer*, 12 B. 521.

And where a legacy was given, if husband and wife should not be living together, half to the husband and half to the wife absolutely, the wife took to her separate use. *Shewell v. Dwarria*, Johns. 172.

So, too, a direction that the devisee is to receive the rents herself, whether married or single, creates a separate use. *Goulder v. Camm*, 1 D. F. & J. 146.

Maintenance.

Probably a gift for the maintenance and support of a woman referred to by the testator as married would create

a separate use. *Darley v. Darley*, 3 Atk. 399; *Cape v. Cape*, 2 Y. & C. Ex. 543; see *Wardle v. Claxton*, 9 Sim. 524.

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And a power given to trustees to apply income for the maintenance and support of a widow authorises payment of the income to her separate use. *Austin v. Austin*, 4 Ch. D. 233; see *In re Peacock's Trusts*, 10 Ch. D. 490.

The word sole may in some cases be sufficient to create a separate use, but *prima facie* it has no such technical meaning, and the burden of proof is upon those who assert it has. *Lewis v. Mathews*, L. R. 2 Eq. 177; *Massey v. Rowen*, I. R. 1 Eq. 110; L. R. 4 H. L. 288.

Effect of the  
word "sole"  
in creating a  
separate use.

In a marriage settlement where the whole object is to secure to the wife a separate estate, the word may have the force of separate. *Ex parte Ray*, 1 Mad. 199.

But in a will where no such intention can be presumed, further indication is necessary.

a. A gift to "A., the wife of B., for her sole use," creates a separate use. *Inglefield v. Coghlan*, 2 Coll. 247; *Farrow v. Smith*, W. N. 1877, 21; *In re Amies' Estate*; *Milner v. Milner*, W. N. 1880, 16; *Bland v. Dawes*, 17 Ch. D. 794.

b. The same has been held where, though the legatee was not in the gift to her referred to as married, it appeared from other parts of the will that she was a married woman. *Green v. Britten*, 1 D. J. & S. 649; *Hartford v. Power*, I. R. 2 Eq. 204.

But this is not the case if the legatee be the testator's own wife, so that she must be discovered when the will takes effect. *Gilbert v. Lewis*, 1 D. J. & S. 38; *Green v. Marsden*, 1 Dr. 646.

c. If the legatee is unmarried at the time, but the testator shows that he contemplates her marriage, and expressly wishes to guard against the claims of a future husband, the same effect will follow. *Ex parte Killick*, 3 M. D. & De G. 480; *In re Tarsey's Trust*, L. R. 1 Eq. 561; see *Baker v. Ker*, 11 L. R. Ir. 3.

d. So, too, if a trust is created confined to the particular gift, and no other motive for it is discernible. *Adamson v. Armitage*, 19 Ves. 416.

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But the mere interposition of trustees will not give the word the force of separate if the trust is created for the general purposes of the will, and not confined to the particular gift. *Massey v. Rowen*, L. R. 4 H. L. 288.

RESTRAINT UPON ANTICIPATION.

Restraint  
upon antici-  
pation.

A married woman may be restrained from anticipating the rents and profits of real estate and the income of personalty given to her separate use; a restraint upon anticipation may also be imposed upon corpus.

A restraint upon anticipation imposed by the will of an English testator binds a legatee domiciled in a country where such a restraint is not recognised. *Peillon v. Brooking*, 25 B. 218.

The restraint can only be imposed upon property belonging to the separate use, whether by virtue of the Married Women's Property Act or otherwise. *Baggett v. Meux*, 1 Coll. 138; *Stogdon v. Lee*, (1891) 1 Q. B. 661; *In re Lumley*; *Ex parte Hood Barrs*, (1896) 2 Ch. 690.

A restraint upon anticipation is not inconsistent with the life estate being given without impeachment of waste. *In re Lumley*, *supra*.

A restraint upon anticipation applicable to the rents of real estate devised to a married woman in tail does not prevent her from enlarging the estate tail to a fee with her husband's consent. *Cooper v. Macdonald*, 7 Ch. D. 289.

The case would probably be the same if the restraint upon anticipation were expressly applied to the corpus. *Cooper v. Macdonald*, *supra*.

A married woman entitled to real estate for life to her separate use without power of anticipation, with a testamentary power of disposition, may release her power under the Act for the abolition of fines and recoveries. *Heath v. Wickham*, 5 L. R. Ir. 285.

Restraint  
applied to  
corpus of  
property  
producing  
income.

In the case of a restraint upon anticipation applied to the corpus of real estate, the effect appears to be to restrain the married woman from disposing either of the income or the corpus during coverture except by will. *Baggett v. Meux*, 1 Coll. 138; 1 Ph. 627.

In the case of a fund of personalty given to a married woman with a restraint upon anticipation, a distinction has been drawn between a fund invested so as to produce income, and a gift of a share of proceeds of sale or cash not producing income, the restraint upon anticipation being held effectual in the former case, and ineffectual in the latter. See *In re Ellis' Trusts*, 17 Eq. 409; *In re Croughton's Trusts*, 8 Ch. D. 460; *In re Benton*; *Smith v. Smith*, 19 Ch. D. 277; *In re Clarke's Trusts*, 21 Ch. D. 748; *In re Taber*; *Arnold v. Kayess*, 46 L. T. 805; 51 L. J. Ch. 721; 30 W. R. 883; *In re Coombes*; *Coombes v. Parfitt*, W. N. 1883, 169; see, too, *Re Sarel*, 4 N. R. 321; 10 Jur. N. S. 876; *Re Gaskell's Trusts*, 11 Jur. N. S. 780; *Re Sykes' Trusts*, 2 J. & H. 415.

This distinction is now overruled. The true test is, does the testator intend the fund to be paid to the married woman, or does he intend her to enjoy it only in the shape of income. *In re Bown*; *O'Halloran v. King*, 27 Ch. D. 411.

a. Where a fund is given immediately to a legatee with a direction to pay it to her, the direction to pay overrides a restraint on anticipation. *In re Grey's Settlements*; *Acason v. Greenwood*, 34 Ch. D. 85, 712 (as to the 1,500*l.*, which was not, however, before the Court); *In re Fearon*; *Hotchkin v. Mayor*, 45 W. R. 232.

*A fortiori* is this the case, if the fund is directed to be paid over after a life interest, as force can then be given to the restraint on anticipation by applying it to the reversionary interest. *In re Bown*, *supra*.

b. But where a fund is given on trust for a legatee, a restraint on anticipation will be effectual; and the fact that the fund is given after a life interest or a period of accumulation, does not of itself show that the restraint on anticipation was meant to cease when the fund fell into possession. *In re Grey's Settlements*, *supra*; *In re Tippetts & Newbould's Contract*, 37 Ch. D. 444; *Re Holmes*; *Hallows v. Holmes*, 67 L. T. 335.

A restraint may be effectually confined to a reversionary interest. *In re Bown*, *supra*.

Where there was a direction to accumulate the income of a  
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Restraint  
upon antici-  
pation of fund  
of personalty.

Direction to  
pay.

Fund to be  
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Determines  
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fund and the rents of realty during the life of an annuitant and after her death to stand possessed of the fund and realty with the accumulations in trust for a married woman, whom the testator restrained from anticipation during the annuitant's life, it was held that the restraint was effectual, and the married woman could not stop the accumulations. *In re Spencer*; *Thomas v. Spencer*, 30 Ch. D. 188.

The restraint upon anticipation attaches only to the separate estate, and therefore determines with coverture. *Barton v. Briscoe*, Jac. 603; *Jones v. Salter*, 2 R. & M. 208; *Woodmeston v. Walker*, 2 R. & M. 197; see *In re Wheeler*; *Briggs v. Ryan*, (1899) 2 Ch. 717.

If nothing is done with the property in the meantime it revives on future coverture. *Tullett v. Armstrong*, 1 B. 1; 4 M. & Cr. 390; *Scarborough v. Borman*, 1 B. 34; 4 M. & Cr. 378; *Re Gaffee*, 1 Mac. & G. 541; see *Hamilton v. Hamilton*, (1892) 1 Ch. 396.

The restraint may be confined to marriage with a particular husband by name. *Morris v. Morris*, 4 Dr. 33; *Hawkes v. Hubbuck*, 11 Eq. 5; see *In re Molyneux's Estate*, 1 R. 6 Eq. 411.

A sale or conversion of the property destroys the separate use. *Wright v. Wright*, 2 J. & H. 647.

What words  
create a  
restraint upon  
anticipation.

Difficulties have sometimes arisen as to what words are necessary to create a restraint on anticipation.

A direction that there is to be no sale or mortgage of the estate devised or the rents arising from it during the life of the devisee, amounts to a restraint on anticipation. *Baggett v. Meux*, 1 Coll. 138; 1 Ph. 627; *Goulden v. Camm*, 1 D. F. & J. 146; *Steedman v. Poole*, 6 Ha. 193; see, however, *Re Hutchings to Burt*, 59 L. T. 490.

The same has been held of a direction that the receipts of the devisee alone, after the payment of the rents devised shall have become due, should be sufficient discharges. *Field v. Erans*, 15 Sim. 375; *Baker v. Bradley*, 7 D. M. & G. 597; *White v. Herrick*, 21 W. R. 454; *In re Smith*; *Chapman v. Wood*, 51 L. T. 501.

But a direction to pay to the legatee personally, or on her

receipt alone, will not restrain anticipation. *Re Ross's Trust*, 1 Sim. N. S. 196; *Wagstaff v. Smith*, 9 Ves. 520, 524; *Acton v. White*, 1 S. & St. 429.

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When the legatee has a power to appoint the accruing rents, but not by way of anticipation, and in default of appointment there is a gift to her for her separate use, the restraint upon anticipation applies only to the exercise of the power. *Barrymore v. Ellis*, 8 Sim. 1; *Medley v. Horton*, 14 Sim. 222.

But if the gift in default of appointment is followed by a receipt clause applied to the same rents as those she has power to appoint, the restraint upon anticipation will extend to the whole gift. *Moore v. Moore*, 1 Coll. 54; *Brown v. Bamford*, 1 Ph. 620.

A restraint upon anticipation does not affect income which has accrued due though not paid. *Hood Barrs v. Heriot*, (1896) A. C. 174; overruling *Cox v. Bennett*, (1891) 1 Ch. 617; *Hood Barrs v. Cathcart*, (1894) 2 Q. B. 559; *Pillers v. Edwards*, 71 L. T. 788, so far as *contra*.

Restraint  
ceases as  
regards  
income due.

A judgment against a married woman restrained from anticipation can therefore be enforced against income due at the date of the judgment, but not against income afterwards becoming due. *In re Lumley*, (1896) 2 Ch. 690; *Whiteley v. Edwards*, (1896) 2 Q. B. 48.

But a married woman restrained from anticipation cannot assign an apportioned part of the income accruing at the date of the assignment. She can only assign what has actually become payable according to the instrument under which it is payable. *In re Brettell*; *Jollands v. Burdett*, 2 D. J. & S. 79.

Apportioned  
part not  
assignable.

Sect. 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), provides that in any proceeding by a woman or by a next friend on her behalf, the Court may order payment of the costs of the opposite party out of property subject to a restraint upon anticipation. See *Hood Barrs v. Cathcart*, (1894) 3 Ch. 376; *In re Godfrey*; *Thorne-George v. Godfrey*, W. N. 1895, 12.

## CHAPTER XXXVIII.

## LIMITATIONS BY WAY OF REMAINDER—DIVESTING.

## I. WHAT CANNOT BE GIVEN OVER.

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Remainder in  
chattels.

IN some things nothing less than an absolute interest can be given.

There can be no remainder in the strict sense of the word of chattels. At law a grant of chattels for life vests the whole legal interest in the tenant for life.

This rule, however, does not apply to gifts by will. It has long been settled that under a gift by will of a term to A. for life, and after his death to B., or to the children of A., the legal interest passes by way of executory devise to the person entitled under the will on the death of the tenant for life. *Manning's Case*, 8 Rep. 94b; *Lampet's Case*, 10 Rep. 46b; *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81.

In some cases the nature of the property is such as not to allow of successive limitations; thus:—

Consumable  
articles cannot  
be given over.

Things *que ipso usu consumuntur* cannot be given over, unless they form part of a stock-in-trade. *Randall v. Russell*, 3 Mer. 190; *Andrew v. Andrew*, 1 Coll. 690; *Groves v. Wright*, 2 K. & J. 347; *Bryant v. Easterson*, 7 W. R. 298; 5 Jur. N. S. 166; *Phillips v. Beal*, 32 B. 25; *Cockayne v. Harrison*, 13 Eq. 432; see *Re Hall's Will*, 19 Jur. 974; *Re Colyer*, 55 L. T. 344; *Connolly v. Connolly*, 56 L. T. 304.

Even in the case of stock-in-trade if the tenant for life is not to be liable for depreciation he takes absolutely. *Breton v. Mockett*, 9 Ch. D. 95.

But a gift of so much of the testator's wine as the legatee can consume in the house is effectual, and does not make the



legatee absolute owner of the wine. *Re Colyer*; *Millikin v. Snelling*, 55 L. T. 344.

Absolute interests can of course not be limited over by way of remainder; thus a devise, if A. dies without heirs, after a prior devise to A. in fee, is void. *Tilbury v. Tarbut*, 3 Atk. 617; 1 Ves. Sen. 88.

And in the same way absolute interests in personalty cannot be given to several persons in succession. *Byng v. Lord Strafford*, 5 B. 558; see *In re Percy*; *Percy v. Percy*, 24 Ch. D. 616.

But if personalty is given to A. and the heirs of his body with remainder to B. and the heirs of his body, and A. dies before the testator, B. takes, though he could have taken nothing if A. had survived. *In re Lowman*; *Devenish v. Pester*, (1895) 2 Ch. 348; overruling dicta in *Harris v. Davis*, 1 Coll. 416, and *Hughes v. Ellis*, 20 B. 193; *Greated v. Greated*, 26 B. 621, so far as *contra*.

It would seem that a gift of consumable articles to A. for life, remainder to B., would not lapse by A.'s death in the testator's lifetime, notwithstanding *Andrew v. Andrew*, 1 Coll. 690.

There can be no gift over of so much as a legatee does not dispose of where an absolute interest has been given to the legatee. *Watkins v. Williams*, 3 Mac. & G. 622; *Henderson v. Cross*, 29 B. 216; *Bower v. Goslett*, 27 L. J. Ch. 249; 6 W. R. 8; *In re Jones*; *Richards v. Jones*, (1898) 1 Ch. 438; *In re Walker*; *Lloyd v. Tweedy*, (1898) 1 Ir. 5.

Such a limitation is, however, valid in a settlement. *Turner v. Caulfield*, 7 L. R. Ir. 347.

Nor can there be a gift over of what remains after payment of the debts of a legatee to whom an absolute interest is given. *Perry v. Merritt*, 18 Eq. 152.

The case is, of course, different if the true construction is that the legatee takes a life interest only (see *ante*, p. 455), and if a fund is given to a person expressly for life, with a power of disposing of it during life or by will, a gift of it after the death of the donee of the power is good, so far as the power is not exercised. *Surman v. Surman*, 5 Mad. 123; *Pennock v.*

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There can be no remainder after an absolute interest.

Gift of personalty after absolute gift which lapses

Gift over of so much as a legatee does not dispose of is void.

Life interest, with power to appoint.

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*Pennock*, 13 Eq. 144; *In re Thomson's Estate*; *Herring v. Barrow*, 13 Ch. D. 144; 14 *ib.* 263; *In re Stringer's Estate*; *Shaw v. Jones-Ford*, 6 Ch. D. 1; *Moore v. Ffolliott*, 11 L. R. Ir. 206; see *Re Brook's Will*, 2 Dr. & S. 362; *In re Heginbotham*; *Wilson v. Heginbotham*, W. N. 1884, 179.

Estate *pur*  
*autre vie*.

An executory gift over of an estate *pur autre vie* given to a man and his heirs is valid, and cannot be destroyed by the devisees in fee. *In re Barber's Settled Estates*, 18 Ch. D. 625.

## II. LIMITATIONS DISTINGUISHED.

Limitations (excluding immediate limitations of particular estates) fall most naturally into limitations disposing of property in which partial or contingent interests have been previously given, and limitations varying and re-arranging previous dispositions.

Legal  
remainders  
and executory  
interests.

A legal remainder of freehold must be supported by a previous estate of freehold, otherwise it can only be supported as an executory devise.

And as no limitation can be a remainder following upon an estate less than an estate for life, so no limitation can be a remainder following upon a determinable fee, or any greater estate. *Fearne*, C. R. 225; *Seymour's Case*, 10 Rep. 95b.

And a limitation following upon an executory limitation must itself be executory and cannot be a remainder. *Fearne*, C. R. 503.

Where an estate can take effect as a remainder, it will never be construed an executory devise or springing use. *Carwardine v. Carwardine*, 1 Ed. 27; *Goodtitle v. Billington*, Dougl. 725; *Fearne*, C. R. 386; *Doe d. Scott v. Roach*, 5 M. & S. 482; the reason given being that "executory interests, not by way of remainder, unless engrafted on an estate tail, cannot be barred, and consequently there is a tendency in such interests to a perpetuity, which is contrary to the policy of the law." *Smith's Ex. Dev.* 71.

The death of the testator is the time to ascertain whether a limitation is a contingent remainder or an executory devise. Thus, under a devise to A. for life, and then to the first and other sons of B. in tail, if A. dies in the lifetime of the testator,

and B. has no sons living at the testator's death, the devise to the sons of B. will take effect as an executory limitation.

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*Hopkins v. Hopkins*, Ca. t. Talb. 44.

Where there is a gift to A. for life, with remainder to such of her children as before or after her death attain twenty-one, the devise must be construed as executory, as in the case of children under twenty-one at the death of A. it could not take effect as a remainder. *In re Lechmere & Lloyd*, 18 Ch. D. 524; *Miles v. Jarvis*, 24 Ch. D. 638; *Dean v. Dean*, (1891) 3 Ch. 150; overruling on this point *Brackenbury v. Gibbons*, 2 Ch. D. 417; see, too, *Symes v. Symes*, (1896) 1 Ch. 272.

And the same principle has been applied to a devise in remainder to children who should attain twenty-one, where there was a maintenance clause to take effect after the death of the tenant for life as regards any minors' then presumptive shares. *In re Bourne*; *Rymer v. Harpley*, 56 L. J. Ch. 566; 56 L. T. 388; 35 W. R. 359.

Contingent remainders can no longer fail by forfeiture, surrender, or merger, but (except in cases within 40 & 41 Vict. c. 33) they will fail by the failure of the particular estate of freehold, before the remainder is ready to come into possession. *Rhodes v. Whitehead*, 2 Dr. & Sm. 532; *Price v. Hall*, 5 Eq. 399; *Percival v. Percival*, 9 Eq. 386; *Brackenbury v. Gibbons*, 2 Ch. D. 417.

Incidents of  
remainders.

Contingent remainders of copyholds are liable to fail in the same way by failure of the particular estate before they have vested. *Lane v. Pannel*, 1 Roll. Rep. 238, 317, 438; *Fearne*, C. R. 310, 320.

Copyholds.

If the legal estate is devised to trustees, or is outstanding, for instance in a mortgagee, the remainder is not a remainder in the strict sense of the word, and the rules as to contingent remainders do not apply. *Hopkins v. Hopkins*, 1 Atk. 581; *In re Eddels' Trusts*, 11 Eq. 559; *Berry v. Berry*, 7 Ch. D. 657; *Astley v. Micklethwait*, 15 Ch. D. 59. See *Dunning*, Conc. Prec. 218, n.

Equitable  
remainder in  
land.

The fact that after the death of the testator and after the passing of the Contingent Remainders Act, 1877, the mortgagee reconveyed the legal estate to the uses of the will was held not

Reconveyance  
of legal  
estate.

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to render the remainders liable to destruction by the termination of the life estate before they vested. *Re Freme; Freme v. Logan*, (1891) 3 Ch. 167.

Estates *pur*  
*autre vie*.

A contingent remainder in an estate *pur autre vie* requires no particular estate to support it. *Pickersgill v. Grey*, 10 W. R. 207; 31 L. J. Ch. 394; *Ferguson v. Ferguson*, 17 L. R. Ir. 552.

Personalty.

The rule does not of course apply to personalty.

40 & 41 Vict.  
c. 33.

The Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), is set out, *ante*, p. 283.

An estate may  
be a remainder  
or an execu-  
tory devise,  
according to  
the events.

An estate may, according to the events that happen, be either a remainder or an executory devise. For instance, if after life estates there is a devise to children in fee, and if they die under twenty-one over, the devise over, if there are children to take who die under twenty-one, would be an executory devise; yet the implied devise over, in case there were no children to take at all, would be a contingent remainder. *Doe d. Ecers v. Challis*, 18 Q. B. 224; 7 H. L. 531; *Brookman v. Smith*, L. R. 6 Ex. 291, p. 305; see *In re Bence; Smith v. Bence*, (1891) 3 Ch. 242.

Remainder  
distinguished  
from an  
immediate  
vested estate  
subject to  
a term.

A remainder must be distinguished from an immediate vested estate, subject to a term; thus, where an estate of freehold is limited after a term, it is either a vested estate or an executory devise. For instance, a devise to A. for a term of eighty years, if he shall so long live, and after his death to B., gives B. strictly speaking an executory interest, since A. may live longer than eighty years, and the freehold would therefore be in suspense during the remainder of A.'s life. It has, however, been held that B. takes a vested interest, "for the mere possibility that a life in being may endure for eighty years to come does not amount to a degree of uncertainty sufficient to constitute a contingency." *Fearne*, C. R. 21; *Napper v. Sanders*, Hutt. 118; cit. 3 Atk. 781; *Lord Derby's Case*, cit. Lit. Rep. 370.

This applies, however, only "where the life cannot exceed the term, and the term must determine with the life." It does not apply, for instance, where the term is only for sixty years. *Beverley v. Beverley*, 2 Vern. 181.

In the same way a devise, after payment of debts, is not a remainder but an immediate vested interest. *Barnardiston v. Carter*, 1 P. W. 505; 3 B. P. C. 64; *Bayshan v. Spencer*, 1 Ves. Sen. 142; see 1 Coll. Jur. 378; and see *ib.* 214; and *Hathorn v. Foster*, 9 T. L. R. 497; 10 T. L. R. 64.

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Devise after  
payment of  
debts is  
vested.

Again, dispositions by way of remainder may be intended to take effect only after the determination of prior partial interests, or they may be alternative contingent remainders intended to provide for the case of prior contingent limitations not taking effect. In the former case, if any of the intermediate limitations are void, the remainders fail with them; in the latter, the limitations are good if the events upon which they are to take effect happen. *Brudenell v. Elwes*, 1 East, 442; *Crompe v. Barrow*, 4 Ves. 681.

Remainders  
and alterna-  
tive con-  
tingent  
limitations.

Thus, in a devise to A. for life, then to his first son for life, and after his decease to the first and other sons of such first son successively in tail, and in default of issue of A., or in case of his not having any at his decease over, if A. has a son and grandson, the devise over in default of issue of A. is a disposition by way of remainder of something not previously disposed of; while the devise, in case of his not having any issue at his decease, is an alternative contingent limitation, disposing of something previously disposed of, in the event of that disposition failing in a particular way. *Mouypenny v. Dering*, 2 D. M. & G. 145; *Doe d. Evers v. Challis*, 18 Q. B. 224; 7 H. L. 531; *Percival v. Percival*, 9 Eq. 386.

And the same limitation may, according to the events that happen, be a disposition to take effect after the failure of prior limitations, or a substitutional limitation intended to meet the case of prior limitations never taking effect at all. For instance, a limitation in default, or for want of persons to take under prior limitations for life or in tail, takes effect either in default of persons to take the prior estates, or after the determination of their estates. *Goodright v. Jones*, 4 Mau. & S. 88; *Lewis d. Ormond v. Waters*, 6 East, 336; see *Doe v. Dacre*, 1 B. & P. 250; 8 T. R. 112.

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III. DIVESTING.

A gift which is given over in certain events is divested if those events happen.

A vested interest which is given over in certain events is divested, if those events happen, though the gift over may be void, or though the legatee to take under the gift over dies before the testator. *Doe d. Blomfield v. Eyre*, 5 C. B. 718; *Robinson v. Wood*, 6 W. R. 728; 27 L. J. Ch. 726; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Hurst v. Hurst*, 21 Ch. D. 278; *Donohoe v. Mooney*, 27 L. R. Ir. 26. In *Jackson v. Noble*, 2 Kee. 500, the question was, whether the event upon which the gift over was to take effect had happened, and it was held it had not, the period during which it was to take effect being limited to the lives of the persons to take under the gift over.

But if the contingency of there being a person to take living at the time can be looked upon as part of the event upon which the gift over is to take effect, the original gift will remain if there is no such person. *Crozier v. Crozier*, 15 Eq. 282; *Mouck v. Croker*, (1899) 1 Ir. 56.

Upon this principle, under a gift to the testator's two sons and daughter in equal shares, with a gift over of the daughter's share, if she should die without issue, to the survivors or survivor of the sons, it was held that the daughter, having survived the sons, took absolutely. *Jones v. Davies*, 28 W. R. 455; see *Eaton v. Barker*, 2 Coll. 124.

Substitutional gifts to survivors.

In the case of a substitutional gift to several persons, or to such of them as may survive the tenant for life, if none survive the tenant for life the original gift remains, whether the gift is vested or contingent. *Sturges v. Pearson*, 4 Mad. 411; *Wagstaff v. Crosbie*, 2 Coll. 746; *Re Sanders' Trust*, L. R. 1 Eq. 675.

It is indifferent whether the gift is in the simple form "to several or the survivors," or whether there is an express gift over, in the event of any members of a class dying before the tenant for life, to the survivors; in such a case, if none survive the tenant for life, the original gift remains. *Harrison v. Foreman*, 5 Ves. 207; *Littlejohns v. Household*, 21 B. 29; *Page v. May*, 24 B. 323; *Cambridge v. Rous*, 25 B. 409;

*Marriott v. Abell*, 7 Eq. 478; *In re Pickworth*; *Snaith v. Parkinson*, (1899) 1 Ch. 642.

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Similarly, if there is a gift, after a life interest, to parents or their children, or if the shares of parents are expressly given in the event of their dying before the tenant for life to their children, the shares of the parents remain absolute if there are no children. *Smither v. Willock*, 9 Ves. 233; *Hervey v. M'Laughlin*, 1 Pr. 264; *Salisbury v. Petty*, 3 Ha. 86.

Substitutional  
gifts to  
children.

A distinction must be drawn between a gift over of the whole of a prior interest in certain events, and a gift over of a portion of the prior interest in certain events. In the latter case the prior interest is divested only so far as is necessary to give effect to the gift over.

Distinction  
between a  
gift over in  
certain events  
of the whole  
and of a  
partial  
interest.

Thus, if there is a devise in fee, followed by a gift over to another person for life if the devisee dies without issue, the devisee in that event, nevertheless, takes the fee, subject only to the life interest. *Gatenby v. Morgan*, 1 Q. B. D. 685.

#### IV. THE CONSTRUCTION OF GIFTS OVER.

When property is given over in one event to one person, and in another event to another, and both events occur simultaneously, the original gift is not divested. *Ormerod v. Riley*, 12 Jur. N. S. 112. See *Drennan v. Andrew*, 36 L. J. Ch. 1.

Gifts over on  
two different  
events to  
different per-  
sons where  
both events  
happen.

When there is a gift over upon a certain contingency, it will not take effect unless the exact contingency happens. Thus, if there is a gift to A. with a gift over if he dies in the testator's lifetime, and A. dies simultaneously with the testator, the gift over does not take effect. *Wing v. Angrave*, 8 H. L. 183; *Elliott v. Smith*, 22 Ch. D. 236.

The exact  
event must  
happen in  
order that a  
gift over may  
take effect.

There are here two distinct and independent events, in which the gift to A. will lapse, death in the testator's lifetime and death simultaneously with the testator, one of which the testator has contemplated and the other not. No doubt it may be said, that the gift over might be read as equivalent to "if A. does not survive me to B.;" but this would be making a will for the testator, since the event that has happened does not include the event contemplated, and it cannot be said that if the gift over was to have effect if A. died in the testator's

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Rule in  
*Jones v.*  
*Westcomb.*

lifetime, *à fortiori* it was to have effect if A. died simultaneously with the testator. The most that can be affirmed is that if the testator could be consulted he would probably say, that the gift over was to have effect equally in either event.

There is, however, a class of cases where, though the exact event upon which the gift over is to take effect does not happen, the gift over must *à fortiori* have been intended to take effect in the event that happens.

For instance, if there is a gift to a child of which the testator supposed his wife to be enceinte with a gift over if the child dies under twenty-one, or a gift to a class of children with a gift over if they all die under twenty-one, and the wife is not enceinte, or there never are any children of the class, the gift over nevertheless takes effect. *Jones v. Westcomb*, Prec. Ch. 316; 1 Eq. C. Ab. 245, pl. 10; *Gulliver v. Wickett*, 1 Wils. 105; *Statham v. Bell*, Cowp. 40; *Meadows v. Parry*, 1 V. & B. 124; *Mackinnon v. Sewell*, 2 M. & K. 214.

Under this head comes a gift to a woman if she survives her husband, and if not as she shall by will appoint. The woman is absolutely entitled if she never marries. *Brock v. Bradley*, 33 B. 670.

And a gift over of the shares of three named beneficiaries, if they should die under twenty-one and unmarried, was held to take effect as regards one of them who died before the date of the will an infant and unmarried. *In re Sheppard's Trust*, 1 K. & J. 269; see *Barnes v. Jennings*, L. R. 2 Eq. 448 (a voluntary settlement).

Gift if condition not performed.

Again, if there is a gift to a legatee with a gift over if the legatee neglects to perform a condition, the gift over takes effect if the legatee never comes into existence or dies before the testator, or if the gift to the legatee is itself void, so that the legatee is never able to perform the condition. *Scatterwood v. Edge*, 1 Salk. 229; *Fearne*, C. R. 237; *Arclyn v. Ward*, 1 Ves. 420; *Re Green's Estate*, 1 Dr. & S. 68; *Warren v. Rudall*, 9 H. L. 420.

Gifts in default of appointment.

The same principle is illustrated by gifts in default of appointment under powers.

Thus, a gift in default of appointment takes effect though



the donee of the power predeceases the testator. *Edwards v. Saloway*, 2 De G. & S. 248; 2 Ph. 625; not following *Baker v. Hanbury*, 3 Russ. 340; *Nichols v. Haviland*, 1 K. & J. 504; *Kellett v. Kellett*, I. R. 5 Eq. 298; see *Hardwick v. Thurston*, 4 Russ. 380.

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And such a gift is good though the power is one which cannot be exercised. For instance, if A., having power to appoint to his issue, appoints to a son for life with remainder, as such son by will appoints, or with remainder to such children as he appoints, or with remainder to a class of persons not being objects of the original power, as he appoints with a gift in default of appointment, the power given to the son cannot be exercised, but yet the gift in default takes effect. *Webb v. Sadler*, 8 Ch. 419; *Williamson v. Farwell*, 35 Ch. D. 128; *In re Abbott*; *Peacock v. Frigout*, (1893) 1 Ch. 54.

There is another class of cases in which though the contingency is penned in such a way as not in terms to include the event which happens, yet the Court will consider what was the contingency really contemplated by the testator, and will give effect to the will if that contingency happens. For instance, if there is a gift if all but one of the testator's children die under twenty-one, or a gift if there should be not more than two children and there are no children, the gift takes effect. *Murray v. Jones*, 3 V. & B. 313; *Wilkinson v. Thornhill*, 61 L. T. 362.

Court considers what the contingency contemplated is.

On this principle, a gift if the testator's wife should die within twelve months of his decease took effect, though she died before him, the contingency contemplated being the wife not being alive at the expiration of twelve months. *Davies v. Davies*, 30 W. R. 918.

If there is a gift to a person with a gift over in the event of his death in a particular manner, as, for instance, to A., and if he dies under twenty-one to B. :—

Construction of gifts over upon death of the legatee under a given age.

1. If A. dies under twenty-one, in the lifetime of the testator, the gift over takes effect. *Darrel v. Molesworth*, 2 Vern. 378; *Willing v. Baine*, 2 Eq. Ab. 545, pl. 32; 3 P. W. 115; *Kellett v. Kellett*, I. R. 5 Eq. 298. In this case the failure of the prior gift is due not to lapse merely, since if A.

Case where the legatee dies before the testator under the given age.

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Where the  
legatee dies  
over the  
given age  
before the  
testator.

had survived the testator the gift to him would not have been indefeasible until he had attained twenty-one.

2. If A. dies over twenty-one in the testator's lifetime, the gift over does not take effect. *Williams v. Chitty*, 3 Ves. 544; *Doo v. Brabant*, 3 B. C. C. 93; 34 T. R. 706; *Humberstone v. Stanton*, 1 V. & B. 385; *M'Carthy v. M'Carthy*, 3 L. R. Ir. 317.

In this case since A., if he had survived, would have taken an indefeasible interest, the failure of the gift to him is due to lapse only, which the testator cannot be supposed to have contemplated, and the event on which alone there is a bequest to the claimant has not occurred.

So if there is a gift to A. for life and then to his issue, with a gift over if he dies without issue, the gift over takes effect if A. dies before the testator without issue. *Rackham v. De la Mare*, 2 D. J. & S. 74; see *Bastin v. Watts*, 3 B. 97.

Where the prior gift is to a class, the following rules may be laid down; suppose a gift to children as a class, followed by a gift over, if they die under twenty-one:—

Gift to class  
with gift over  
if all die  
under 21,  
where the  
class never  
comes into  
existence.

1. If the contemplated class never comes into existence, the gift over takes effect on the principle already stated, *ante*: *Jones v. Westcomb*, 1 Eq. Ab. 245, pl. 10; *Mackinnon v. Sewell*, 2 M. & K. 202. In these cases the condition is more than fulfilled, since the events that have happened include the condition upon which the property is given over.

If all die  
under 21  
before the  
testator.

2. If members of the class come into existence, but die under twenty-one in the testator's lifetime. In this case, too, it seems the gift over will take effect, and the same arguments would apply as to the previous case, with the additional argument that the condition is in fact literally fulfilled. It is not by reason of lapse that the gift over takes effect, since if the legatees in question had survived the testator, the gift over would still have held good in the events that have happened. See *Brookman v. Smith*, L. R. 6 Ex. p. 303; *Mackinnon v. Peach*, 2 K. 555; but see *Greated v. Greated*, 26 B. 621.

If all die  
before the  
testator, but  
not under 21.

3. If members of the class come into existence, survive twenty-one, and die in the testator's lifetime, the gift over will not take effect: *Tarback v. Tarback*, 4 L. J. Ch. 129; *Brookman v. Smith*, L. R. 6 Ex. 291; *ib.* 7 Ex. 271; or, to

state the rule more generally, if all conditions are fulfilled which would entitle those taking under the prior gift to indefeasible interests, supposing they had survived the testator, if, in other words, the failure of the prior gift is due to lapse and lapse only, the gift over does not take effect.

#### V. GIFTS OVER UPON DEATH TREATED AS A CONTINGENT EVENT.

1. If there is an immediate gift to A., and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A.'s death before the testator. *Lord Bindon v. Earl of Suffolk*, 1 P. W. 96; *Turner v. Moor*, 6 Ves. 556; *Cambridge v. Rous*, 8 Ves. 12; *Crigan v. Baines*, 7 Sim. 40; *Taylor v. Stainton*, 2 Jur. N. S. 634; *Ingham v. Ingham*, I. R. 11 Eq. 101; *In re Neary's Estate*, 7 L. R. Ir. 311; *Elliott v. Smith*, 22 Ch. D. 236; *In re Bourke's Trusts*, 27 L. R. Ir. 573; see *Watson v. Watson*, 7 P. D. 10.

Gift over in case of the legatee's death.

This rule applies though the gift over may be to persons "then living," or to survivors. *Trotter v. Williams*, Prec. Ch. 78; *King v. Taylor*, 5 Ves. 806.

So, too, a gift to several, with a gift over in case of the death of either in the lifetime of the others or other, was confined to death before the testator, the death of one before the other being a certain and not a contingent event. *Howard v. Howard*, 21 B. 550.

It makes no difference that the gift in case of A.'s death is to his children. *Slade v. Milner*, 4 Mad. 144; *Schenck v. Agnew*, 4 K. & J. 405.

And this construction has been adopted where the gift over was "in case of his decease or at his decease." *Arthur v. Hughes*, 4 B. 506.

But, as a rule, when there is a gift to A. indefinitely, followed by a gift at his decease, A. will take only a life interest. *Constable v. Bull*, 3 De G. & S. 411; *Waters v. Waters*, 26 L. J. Ch. 624; *Adams' Trust*, 14 W. R. 18; *Joslin v. Hammond*, 3 M. & K. 110; *Reid v. Reid*, 25 B. 469; *Bibbens*

Gift over at the legatee's death.

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General  
intention that  
the gift was  
to take effect  
after A.'s  
death.

v. *Potter*, 10 Ch. D. 733; *Re Houghton*; *Houghton v. Brown*, 50 L. T. 529; *Re Russell*, 52 L. T. 559.

2. A gift over "in case of the death of A." has been construed as equivalent to "after his death" in the following cases:—

a. Where the gift is only of a life interest, and the remainder would otherwise be undisposed of. *Smart v. Clark*, 3 Russ. 365; *Tilson v. Jones*, 1 R. & M. 553; *Ingham v. Ingham*, 1 R. 11 Eq. 101.

b. Where the testator has given the absolute interest in another legacy in express terms, or has shown an intention to provide in all events for the person to take "in case of the death of A.," or has expressly provided for the death of the legatee in his lifetime with regard to another legacy to the same legatee, there is ground for arguing that the gift over in case of the death of A. was to take effect upon his death at any time. *Billings v. Sandom*, 1 B. C. C. 393; *Nowlan v. Nelligan*, 1 B. C. C. 489; *Douglas v. Chalmer*, 2 Ves. Jun. 501.

c. So a direction in the event of A.'s death to *continue* her annuity for the benefit of her children will not be construed as providing only against lapse. *Wilkins v. Jodrell*, 13 Ch. D. 564.

Gift over in  
case of the  
legatee's  
death after a  
life interest.

3. If the gift is after a life estate, or a time is appointed for payment, the words "in case of death" refer to death at any time before the vesting in possession, whether before or after the testator. *Hervey v. M'Laughlin*, 1 Pr. 264; *Johnson v. Antrobus*, 21 B. 556; *Bolitho v. Hillyar*, 34 B. 180; *Hodgson v. Smithson*, 21 B. 356; 8 D. M. & G. 604; and see *James v. Baker*, 8 Jur. 750.

It appears that a gift after a life interest to executors for their trouble, with a gift over in case of death, would *prima facie* mean death before the testator. *Green v. Barrow*, 10 Ha. 459.

Gift over of  
realty in case  
of the death  
of the devisee.

4. In the case of realty a devise to A. simply in a will before the Wills Act, and in case of his death over, would perhaps be construed as to A. for life; and after his death over. *Boucen v. Scourcroft*, 2 Y. & C. Ex. 640; see, however, *Wright v. Stephens*, 4 B. & Ald. 574.

On the other hand, if the devise gives A. the fee, a gift over, in case of A.'s death, will be held to refer to his death before the testator. *Rogers v. Rogers*, 7 W. R. 541.

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# VI. GIFTS OVER UPON DEATH COUPLED WITH A CONTINGENCY.

Sect. 10 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), enacts that "where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not that executory limitation shall be or become void and incapable of taking effect if, and as soon as, there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect."

Conveyancing  
Act, 1882,  
s. 10.

The section applies where the executory limitation is contained in an instrument coming into operation after the 31st December, 1882. It will be noticed that the section is limited to land.

In cases where the Act does not apply, the following rules are deducible from the cases:—

If there is an immediate gift to A., and if he dies without issue over, the gift over takes effect upon the death of A. without issue at any time, whether before or after the testator. *Farthing v. Allen*, 2 Mad. 310; 2 Jarm. 1596; *Smith v. Stewart*, 4 De G. & S. 253; *Cotton v. Cotton*, 23 L. J. Ch. 489; *Bowers v. Bowers*, 8 Eq. 283; 5 Ch. 244; *Else v. Else*, 13 Eq. 196; *Varley v. Winn*, 2 K. & J. 705; *Woodrooffe v. Woodrooffe*, (1894) 1 Ir. 299.

Gift over  
upon death  
without issue  
is not con-  
fined to death  
before the  
testator.

Similarly, if the gift is future, as to A. for life and then to B., and if B. dies without issue over, the gift over will take effect upon the death of B. at any time without issue, whether before or after the tenant for life. *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Ingram v. Soutten*, *ib.* 408; overruling the so-called fourth rule in *Edwards v. Edwards*, 15 B. 357.

The fourth  
rule in  
*Edwards v.*  
*Edwards* is  
overruled.

And similarly, a direction to settle a legacy upon marriage is *primâ facie* not restricted to marriage in the lifetime of a tenant for life. *Witham v. Witham*, 3 D. F. & J. 758; see

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In what cases  
the period of  
defeasibility  
will be  
limited.

*In re Dowling's Trusts*, 14 Eq. 468; *Davies v. Davies*, 50 L. J. Ch. 628, where the bequest was immediate and the direction restricted to a year from the death.

There may, however, be circumstances in the will limiting the defeasibility to some earlier time than the death of the legatee without issue. Some of the cases decided on the authority of *Edwards v. Edwards* are probably not reconcilable with the rule laid down in *Ingram v. Soutten*. See *Allen's Estate*, 3 Dr. 380.

The following rules seem, however, to be admitted in *O'Mahoney v. Burdett*, *supra*.

Gift over to  
survivors.

1. Possibly, where there is a gift over, if any members of a class die without issue to the survivors the gift over must take effect, if at all, before the time when the survivors are to be ascertained.

Thus, if the gift is immediate the gift over may be limited to the happening of the event in the testator's lifetime. *In re Smaling*; *Johnson v. Smaling*, 26 W. R. 231; see *Apsey v. Apsey*, 36 L. T. 941; a case apparently inconsistent with *Bowers v. Bowers*, 5 Ch. 244.

If the gift is, after a life interest, to several, and if any die without issue to the survivors, the gift over may in the same way be limited to death without issue before the tenant for life. See *Clark v. Henry*, 11 Eq. 222; 6 Ch. 588; *Besant v. Cox*, 6 Ch. D. 604.

Where the  
donees to take  
upon death  
without issue  
of a prior  
legatee are  
contemplated  
as taking  
through the  
medium of a  
trust which  
determines at  
a certain  
time.

2. If the fund is vested in trustees who are directed to distribute it at a certain time, so that the trusts then determine, and the legatees who are to take upon the death of prior legatees without issue are contemplated as taking through the medium of the same trustees, there is *prima facie* reason for restricting the death without issue to death without issue before the time of distribution. *Galland v. Leonard*, 1 Sw. 161; *Wheable v. Withers*, 16 Sim. 505; *Edwards v. Edwards*, 15 B. 357; *Beckton v. Barton*, 27 B. 99; *Dean v. Handley*, 2 H. & M. 685; see *Smith v. Colman*, 25 B. 217; *In re Hayward*; *Creery v. Lingwood*, 19 Ch. D. 470; *In re Luddy*; *Peard v. Morton*, 25 Ch. D. 394; *Lewin v. Killey*, 13 App. C. 783, P. C.

But words directing payment or distribution at a certain time will not confine the contingency to that time, if the persons to take upon the death without issue of a prior legatee are not treated as taking through the medium of the same payment or distribution. *Gosling v. Townshend*, 17 B. 245; 2 W. R. 23.

3. And if there are no trustees, but payment or division is directed at the death of the tenant for life, and all the subsequent dispositions are made with reference to the same payment or division, the death without issue will be confined to such death before the time of distribution. *Olivant v. Wright*, 1 Ch. D. 346; *Re Thompson to Curzon*, 52 L. T. 498; see *Re Anstice*, 23 B. 135; *Pearman v. Pearman*, 33 B. 394.

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When all the dispositions of the testator have reference to the time of distribution.

So, if there is a life tenancy and then a gift to a class to be paid when they respectively attain twenty-one, and if any die without issue to the survivors, to be paid at the same time as the original share, death without issue may be limited to such death under twenty-one. *Re Johnson's Trusts*, 10 L. T. 455; *Re Hayne's Trusts*, 18 L. T. 16.

Similarly, if the gift is to A. if living at the death of the tenant for life, and if not, to his children, and if he dies without children over, the ultimate gift over is confined to the lifetime of the tenant for life. *Andrews v. Lord*, 8 W. R. 405; 6 Jur. N. S. 865; see *Wood v. Wood*, 35 B. 587; *In re Hill's Trusts*, 12 Eq. 302.

4. When there is a direction that a legatee is to have the absolute control of her legacy at a particular time, a subsequent gift over will be limited to take effect before that time. *Clark v. Henry*, 11 Eq. 222; 6 Ch. 588.

When the legatee is to have the absolute control at a certain time.

5. If there is a gift over upon death without issue before a given time of all the legatees whose shares have previously been given over upon death leaving issue indefinitely, or if the gift to the persons who are to take upon death of the prior legatees without issue is again given over upon the death of such persons before a certain time, there is a strong argument for restraining the prior gifts over to death of the prior legatees without issue before the same time. *Re Hayes' Will*, 9 Jur. N. S. 1068; *Re Sarjeant*, 11 W. R. 203; *Da Costa v. Keir*, 3

When gifts over subsequent to the gift over upon death without issue are expressly limited within a certain time.

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Gift over in  
every event.

Russ. 360; see *Doe d. Lifford v. Sparrow*, 13 East, 359; *Lloyd v. Davies*, 15 C. B. 76.

6. If there is a gift to A., his heirs, executors, administrators, and assigns, with a double gift over, as well if he dies with as if he dies without issue, it may be contended that in order to give effect to the large words of ownership, the gift over must be referred to death before the testator. This view is supported by *Gee v. Mayor, &c. of Manchester*, 17 Q. B. 797; but *Knight-Bruce, V.-C.*, refused so to limit the gift; see 14 Jur. 825; 19 L. J. Ch. 151; and the direction that the share was to "return" to the sons and daughter certainly made that construction difficult. The doctrine has also been criticised by Lord Hatherley in *Bowers v. Bowers*, 5 Ch. 244. The cases usually cited in support of the same view depend on special circumstances, such as a trust to divide at once or the like. *Clayton v. Lowe*, 5 B. & A. 636; *Doe d. Lifford v. Sparrow*, 13 East, 359; *Woodburne v. Woodburne*, 23 L. J. Ch. 336; *Slaney v. Slaney*, 33 B. 631.

If the gift is merely in general words without any express indication that it is intended to be absolute, the fact that the contingencies upon which the property is given over in effect reduce the interest to a life interest, will not have the effect of confining the happening of the contingencies to the period of distribution. *Gosling v. Townshend*, 2 W. R. 23; *Cooper v. Cooper*, 1 K. & J. 658; *Bowers v. Bowers*, 8 Eq. 283; 5 Ch. 244.

7. Even if the gift over is upon a single contingency, as upon death without issue, it may be limited to death without issue before a particular time, if the intention is clear to give indefeasible interests at that time. *Brotherton v. Bury*, 18 B. 65; *Ware v. Watson*, 7 D. M. & G. 248; *Re Anstice*, 23 B. 135; *Clark v. Henry*, 11 Eq. 222; 6 Ch. 588; perhaps *Barker v. Cocks*, 6 B. 92, and *Davenport v. Bishopp*, 2 Y. & C. C. 463, come under this head.

Gift over  
upon death  
leaving  
children after  
a contingent  
gift.

8. If the gift is contingent, as to A. at twenty-one, there is some reason for restricting a gift over upon death coupled with a contingency to such death under twenty-one.

This construction has been adopted where there was a gift to the testator's nieces if they should attain twenty-one,



with a gift in case a niece should die leaving children to her children, as otherwise the children of a niece dying under twenty-one would have taken nothing. *Home v. Pillans*, 2 M. & K. 15; see L. R. 7 H. L. p. 397; *Randfield v. Randfield*, 8 H. L. 225.

The gift over upon death without issue cannot, however, be restricted to the time of vesting where there is an express gift over upon death merely before the time of vesting. *Martineau v. Rogers*, 8 D. M. & G. 328; see, too, *Smith v. Spencer*, 6 D. M. & G. 631.

9. If what is given over is the share the legatee would have taken, this confines the gift over to the testator's lifetime. *In re Hayward*; *Creery v. Lingwood*, 19 Ch. D. 470.

Gift over of share legatee would have taken.

10. Where there is a gift to two persons, and if either dies under twenty-one without issue to the survivor, and if both die without issue over, the defeasibility may be restricted to the age of twenty-one if there is a direction to convey at twenty-one, or any other indication of intention that the interest was to become indefeasible at twenty-one. *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476; *Wheable v. Withers*, 16 Sim. 504; *Thackeray v. Hampson*, 2 S. & St. 214; see *Else v. Else*, 13 Eq. 196.

Ultimate gift over upon death without issue restricted by prior gift.

11. When there is a gift at twenty-one, or upon marriage with consent, a gift over upon marriage without consent has been confined to the age of twenty-one. *Desbody v. Boyville*, 2 P. W. 547; *Knapp v. Noyes*, Amb. 662; *Osborn v. Brown*, 5 Ves. 527; *West v. West*, 4 Giff. 198; *Duggan v. Kelly*, 10 Ir. Eq. 473.

Gift over upon marriage without consent confined to marriage under 21.

12. It may be noticed that where there is a gift to several, and in case of the death of any to the survivors, and if they die without children over, the gift, in case of death, will not be extended to mean death at any time, nor will the gift upon death without children be confined to such death in the lifetime of the testator. *Clarke v. Lubbock*, 1 Y. & C. C. 492; *Child v. Giblett*, 3 M. & K. 71.

## VII. ACCRUED SHARES.

Clauses in a will disposing of the shares of devisees or legatees dying before a given period or event do not, in the

Effect of gifts over on accrued shares.

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absence of a distinct evidence of intention, extend to shares which have once accrued under those clauses so as to pass them a second time. *Ex parte West*, 1 B. C. C. 575; 1 P. W. 275, n.; *Rudge v. Barker*, Ca. t. Talbot, 124; *Melsom v. Giles*, L. R. 5 C. P. 614; 6 C. P. 532; 6 H. L. 24.

Accrued shares will not pass under the word "share" or "portion." *Cambridge v. Rous*, 25 B. 416; *Bright v. Rowe*, 3 M. & K. 316; *Bardon v. Bardon*, 16 Ir. Ch. 415.

If there is a gift to several to be paid at twenty-one, with a direction that if any die under twenty-one the share is to survive to the others, and two die under twenty-one before the testator, the original share of the one who dies last goes to the survivors, but not the accrued share coming to him on the death of the one who died first. *Rickett v. Guillemard*, 12 Sim. 88.

Accrued shares will go with original shares if there is an intention expressed that they should do so.

Accrued  
shares  
directed to go  
as original  
shares.

1. If, for instance, accrued shares are directed to go in the same manner as original shares. *Cursham v. Newland*, 2 B. 145; *Milsom v. Audry*, 5 Ves. 465; *Eyre v. Marsden*, 4 My. & Cr. 231; *Melsom v. Giles*, L. R. 6 H. L. 24.

Consolidation  
of original  
and accrued  
shares.

2. And when original and accrued shares have once been consolidated by a direction, for instance, that they are to go in the same manner, "there is no occasion to carry on any separate account of the original share from the accrued share," and both will pass under the word "share." *Re Hutchinson*, 5 De G. & S. 681.

Words  
applicable  
to accrued  
shares.

3. If "his or her share or shares" are spoken of where only one original share has been previously given, so that the words cannot be satisfied *reddendo singula singulis*, as might be the case if the words were "his, her, or their, share or shares," accrued shares will be carried over. *Wilmott v. Flewitt*, 13 W. R. 856; *In re Chaston*; *Chaston v. Seago*, 18 Ch. D. 218.

And, apparently, "share and shares and interest" would carry accrued shares. *Douglas v. Andrews*, 14 B. 347.

Where the  
fund is treated  
as an aggregate  
fund.

4. Accrued shares will pass where the testator, though he speaks of individual shares, yet shows that he looks on the fund as existing at the time of distribution as an aggregate

and previously undivided fund by speaking of it, for instance, as the trust fund. *Worldidge v. Churchill*, 3 B. C. C. 465; *Leeming v. Sherratt*, 2 Ha. 14; *Sillick v. Booth*, 1 Y. & C. C. 121, 739; *Barker v. Lea*, T. & R. 413; see *In re Hunter's Trusts*, L. R. 1 Eq. 295.

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So, where the whole fund is given to a class, with benefit of survivorship, the words of survivorship apply to the whole, accrued as well as original shares. *In re Crachall's Trust*, 8 D. M. & G. 480; 2 Jur. N. S. 892.

5. And a gift over of the whole is convincing evidence of the same intention. In such a case "share must have been meant to include every interest accruing as well as original, for otherwise the estate would go away from the issue piecemeal; whereas, it is obvious, nothing was intended to go over, but that all should go over at once on failure of the issue of all the children, as if all but one had died without issue who was intended to take all." *Doe d. Clift v. Birkhead*, 4 Ex. 110; *Douglas v. Andrews*, 14 B. 347; *Dutton v. Crowdy*, 33 B. 272; *Langley v. Langley*, 6 L. R. Ir. 277; see *Sutton v. Sutton*, 30 L. R. Ir. 251.

Gift over of  
the whole  
fund.

6. And if the bequest is of residue, the presumption against intestacy will assist the Court in passing accrued with original shares. *Goodman v. Goodman*, 1 De G. & S. 695.

Where the  
gift is  
residuary.

7. Accrued shares are similarly not liable to the same restrictions as original shares in the absence of a clearly expressed intention so to restrict them. *Gibbons v. Langdon*, 6 Sim. 260; *Ware v. Watson*, 7 D. M. & G. 248; and, on the other hand, *Trickey v. Trickey*, 3 M. & K. 560; *Jarman's Trusts*, L. R. 1 Eq. 71; *Fitzgerald v. Fitzgerald*, 1 R. 7 Eq. 436.

Accrued  
shares are  
*prima facie*  
not subject  
to the restric-  
tion of original  
shares.

8. An appointment under a power by a tenant for life of his share may operate as well upon his accrued as his original share. *Re Denton*; *Bannerman v. Toosey*, 63 L. T. 105.

Appointment  
of share.

9. As to the repeated operation of cross limitations, see *Atkinson v. Jones*, Joh. 246.

Repeated  
operation of  
gifts over.

## CHAPTER XXXIX.

## SUBSTITUTION.

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Gift sub-  
stititutional or  
alternative.

Whether a  
gift to A. or  
B. is sub-  
stititutional or  
a lternative.

Gift to A. or  
B., as C. may  
appoint, is not  
substititutional.

Contingency  
of surviving  
the time of  
distribution  
applied to  
original and  
substituted  
legatees.

"Or"  
changed into  
"and."

THE simplest form of substitutional gift, introduced by the word "or," as, for instance, to class A. or class B., generally involves the relation of smaller to larger class, or of ancestor to descendant.

A simple gift to A. or B. may be substitutional or alternative, and it must be determined from the whole will which was intended. *Carey v. Carey*, 6 Ir. Ch. 255; *Longmore v. Broom*, 7 Ves. 128; *Miller v. Chapman*, 24 L. J. Ch. 409; *Maude v. Maude*, 22 B. 290; *In bonis Bradford*, 72 L. T. 267; *In re Delmar Charitable Trust*, (1897) 2 Ch. 168.

A gift to A. or B., or to A. or his children, as C. may appoint, is not substitutional, and in default of appointment it goes among all the appointees equally. *Penny v. Turner*, 2 Ph. 498; *White's Trusts*, Joh. 656.

A gift of 100l. a-piece to each of the children, grandchildren, or other descendants of A., includes all the descendants. *Solly v. Solly*, 5 Jur. N. S. 36.

When the contingency of surviving the time of distribution is applied both to the original and substituted class; if, for instance, the gift is to parents or their children living at the decease of the tenant for life, the gift will nevertheless be construed as substitutional. *Congreve v. Palmer*, 16 B. 435; *Atkinson v. Bartrum*, 28 B. 219.

In such a case, however, if there is anything to show that the original and substituted class are to take co-ordinately, "or" will be read "and." *Richardson v. Spragg*, 1 P. W. 493, where the gift was to such of the testatrix's daughters, or

daughters' children, as should be living at her son's death, "without considering any superiority or eldership whatever." See *Shand v. Kidd*, 19 B. 310; *In re Cleland's Trusts*, 7 L. R. Ir. 74.

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And where the direction was to pay a sum of money after the death of a tenant for life, "to all and every the testatrix's nephews and nieces, to wit, A. or her children, B. or her children," &c., to be equally divided between them, "or" was read "and"; the words under the *videlicet* being only an expanded description of the persons to take. *Eccard v. Brooke*, 2 Cox, 213.

So, too, where the gift is to such of several persons as should be living at the testatrix's decease, or the issue of such of them as should be married, "or" will be read "and." *Horridge v. Ferguson*, Jac. 583.

Upon the same principle, a gift to children living at the time of distribution, or *their* issue, will be construed as a gift to children then living, and the issue of those then dead, including issue of those dead at the date of the will, but not, it would seem, of those who were dead before the testator was born. *King v. Cleaveland*, 4 De G. & J. 477; *Philps' Will*, 7 Eq. 151; *Burt v. Hellyar*, 14 Eq. 160; *Wingfield v. Wingfield*, 9 Ch. D. 658; *Keay v. Boulton*, 25 Ch. D. 212.

Gifts to  
persons  
"then"  
living, or  
their issue.

A substitutional gift, substituting one set of legatees for others dying before the time of distribution, must be distinguished from an executory gift over intended to take effect at any time. Thus, a gift to children living at a particular time, with a gift over, if any *such* children die leaving issue to their issue, is an executory limitation to take effect at any time. *La Roche v. Davies*, 3 Y. & C. Ex. 612, n.; *Ex parte Hunter*, 3 Y. & C. Ex. 610; *Howes v. Herring*, 1 M'Cl. & Y. 295.

Substitution  
distinguished  
from gift over  
to take place  
at any time.

On the other hand, if the gift is to children living at the time of distribution, with a gift to their issue if any such children die before becoming entitled, the gift to the issue will be construed as substitutional, since children living at the time of distribution could not die without becoming entitled. *Jeyes v. Savage*, 10 Ch. 555; see *Giles v. Giles*, 8 Sim. 360.

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Death of  
original donee  
before testator.  
Direct gift to  
A. or his  
children.

Gift to named  
person or his  
issue after  
life interest.

Substitutional gifts when the original donee dies before the testator :—

A direct gift to A. or his children goes to A. if he survives the testator, and to his children if he does not. *Montagu v. Nucella*, 1 Russ. 165 ; *Gittings v. M'Dermott*, 2 M. & K. 69 ; *Salisbury v. Petty*, 3 Ha. 86 ; *Whitcher v. Penley*, 9 B. 477.

If there is a life interest and then a gift to a named person or his children, the substitution takes effect if the named person dies after the testator and before the tenant for life. *Girdlestone v. Doe*, 2 Sim. 225 ; *Jacobs v. Jacobs*, 16 B. 557 ; *In re Craven*, 23 B. 333.

It also takes effect if the named person dies before the testator. *In re Porter's Trust*, 4 K. & J. 188 ; see *Collins v. Johnson*, 8 Sim. 356, n.

The result is the same if the gift is not in the simple form to A. or his issue, but there is a direction that if any of the named persons die leaving issue the share of the deceased person is to go to his issue. *Le Jeune v. Le Jeune*, 2 Kee. 701 ; *Ire v. King*, 16 B. 46 ; *Ashling v. Knowles*, 3 Dr. 593 ; *Hobgen v. Neale*, 11 Eq. 48.

Gift to class  
after life  
interest with  
substitution.

Where there is a life interest and then a gift to a class, with a direction that issue of a deceased member of the class are to take the parent's share, the substitution takes effect as regards a member of the class dying after the testator in the lifetime of the tenant for life. *Re Gilbert* ; *Daniel v. Matthews*, 54 L. T. 752 ; *Re Miles* ; *Miles v. Miles*, 61 L. T. 359 ; not following *Re Davies' Trusts*, 4 Ch. D. 210.

Parent  
dying before  
testator.

But the children of a parent who dies before the testator do not come in. *Thornhill v. Thornhill*, 4 Mad. 377 ; *In re Hannam* ; *Haddelsey v. Hannam*, (1897) 2 Ch. 39, where *Jones v. Frewin*, 12 W. R. 369 ; 3 N. R. 415 ; and *Habergham v. Ridehalgh*, 9 Eq. 395, are discussed ; see *Smith v. Oliver*, 11 B. 494.

Where, however, the gift was to children living at the death of the tenant for life, with a direction that if any child should die in the tenant for life's lifetime leaving issue, the issue were to take the share the parent would have been entitled to if living, the issue of a child dying in the testator's lifetime were let in, though the words seemed to point to the death of

a child after the testator during the life of the tenant for life. But there the gift to issue was not substitutional. *Smith v. Smith*, 8 Sim. 353.

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If the original gift is to a class living at the testator's death, or at some other time, and the substitutional gift is expressly confined to the children of such persons, the substitution can have no effect with regard to those who never become members of the original class. See *Shergold v. Boone*, 13 Ves. 370; *Smith v. Farr*, 3 Y. & C. Ex. 928.

Case where the original class is confined to persons living at the testator's death.

Whether there can be substitution in respect of legatees dead at the date of the will :—

Death of original donee before date of will.

1. When there is a gift to several persons nominatim, with a substitution of their issue in the event of their death, the fact that one of the persons so named is dead at the date of the will will not prevent his issue from taking. *Hannam v. Simms*, 2 De G. & J. 151; *Ive v. King*, 16 B. 46; *Hobgen v. Neale*, 11 Eq. 48; see *Barnes v. Jennings*, L. R. 2 Eq. 448.

Where the original gift is to named persons.

2. If, however, the original gift is to a class, with a substitutional gift to issue, the question is whether the issue take a share which has been given to a parent who is contemplated as capable of taking under the will, or whether they take a share which has not been previously given to their parent. In the former case issue of parents dead at the date of the will will not take, in the latter they will.

Where the gift original is to a class.

The important point is not whether the gift itself is substitutional, but whether the interests of persons who are contemplated as capable of taking under the will are given in the event of their death to substituted legatees.

Thus, though a gift to such of a class as may be then living, or the issue of any then dead, is strictly substitutional, the issue, if they take at all, take original shares, since nothing is given to parents then dead. *Attwood v. Alford*, L. R. 2 Eq. 479.

When the substituted legatees take original shares.

In the same way a gift to parents "then living," and the issue of those then dead, is a direct substantive gift to the issue. *Smith v. Smith*, 5 Ch. 342; *Martin v. Holgate*, L. R. 1 H. L. 175; see *Ashling v. Knowles*, 3 Dr. 593; *Etches v. Etches*, 3 Dr. 447.

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Gift to  
parents then  
living, and  
the issue of  
those then  
dead.

a. If the gift is to parents and issue in one continuous sentence—as, for instance, to children then living and the issue of those then dead—the issue of parents deceased at the date of the will take, though the issue may be directed to take only a parent's share, as this direction will be satisfied by a distribution *per stirpes*. *Tytherleigh v. Harbin*, 6 Sim. 329; *Rust v. Baker*, 8 Sim. 443; *Bebb v. Beckwith*, 2 B. 308; *Coulthurst v. Carter*, 15 B. 421; *Faulding's Trusts*, 26 B. 263; *In re Philips' Will*, 7 Eq. 151; *Heasman v. Pearse*, 7 Ch. 275.

It seems the issue of a parent who died before the testator was born would not take. *Wingfield v. Wingfield*, 9 Ch. D. 658.

Effect of the  
word "said."

If the gift is to "my children then living, and the children of such of my *said* children as shall be then dead," the testator by using the term "said" children shows that he is contemplating a class of children living at the date of the will, and capable of taking under it, and therefore children of those dead at the date of the will will not be admitted. *Re Thompson's Trust*, 2 W. R. 218; 5 D. M. & G. 280; see *Peel v. Catlow*, 9 Sim. 372; *Smith v. Pepper*, 27 B. 86; *Hall v. Woolley*, 39 L. J. Ch. 106.

On the other hand, if the gift is to the brothers and sisters living at a particular time, and the children of such of the said brothers and sisters as should have died, and the testator has only one brother or one sister living at the date of the will, he cannot be referring to a class existing at the date of the will, and children of brothers and sisters dead at the date of the will will be admitted. *Re Jordan's Trust*, 2 N. R. 57; *Giles v. Giles*, 8 Sim. 360; see *Jarris v. Pond*, 9 Sim. 549.

Gift to my  
daughters and  
their children.

If the children are expressed to be the children of parents who are beneficiaries under the will; if, for instance, the bequest is to "my daughters and their children," the children of a daughter dead at the date of the will take nothing, *Parker v. Tootal*, 11 H. L. 143; see *Crook v. Whitley*, 26 L. J. Ch. 350; but see *Clay v. Pennington*, 7 Sim. 370.

When the  
gift is substi-  
tutional in  
the simplest  
form.

b. When the gift is clearly substitutional, as in the case of a gift to a class or their issue, issue of members of the class dead at the date of the will will not take. *Congreve v. Palmer*, 16 B. 495; *In re Webster's Estate*; *Widgen v. Mello*, 23



Ch. D. 737. The principle seems to have been admitted in *In re Sibley's Trusts*, 5 Ch. D. 494.

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If there is anything to assist the construction, issue of members of the class dead at the date of the will may be let in. Thus, if none of the members of the original class are alive at the date of the will, or if the original class is brothers and sisters, and the testator has only one brother living at the date of the will, children of those then dead will come in. *Gowling v. Thompson*, 11 Eq. 366, n.; see *Barnaby v. Tassell*, 11 Eq. 363; *Jarris v. Pond*, 9 Sim. 549; *In re Sibley's Trusts*, 5 Ch. D. 494; *Walsh v. Blayney*, 21 L. R. Ir. 140.

Where such of the original legatees as are alive at the date of the will do not satisfy the words of gift.

c. Where the gift to the issue is in an independent clause, the question is whether the intention is to add fresh members to or substitute them for the original class.

Gift to the substituted legatees in an independent sentence.

If the gift is to children living at the testator's death, with a direction that if any should happen to die in his lifetime, the "legacy" intended for such child should be for his issue, the word "legacy" shows that the testator meant to substitute only issue of parents who at the date of the will were capable of taking. *Christopherson v. Naylor*, 1 Mer. 320; *Hunter v. Cheshire*, 8 Ch. 751. It may be doubted whether *Phillips v. Phillips*, 13 W. R. 170; 10 Jur. N. S. 1173; and *Parsons v. Gulliford*, 10 Jur. N. S. 231, can stand with these authorities.

Direction that the legacy of a parent should go to his children.

The same rule applies if there is a direction that issue of parents dying are to stand in the place of their parents, or to take their parents' share. *Butter v. Ommaney*, 4 Russ. 71; *Gray v. Garman*, 2 Ha. 268; *Atkinson v. Atkinson*, 1 R. 6 Eq. 184; *Re Hotchkiss's Trusts*, 8 Eq. 643; *Habergham v. Ridehalgh*, 9 Eq. 395; *Kelsey v. Ellis*, 38 L. T. 471; *In re Barker*; *Asquith v. Saville*, 47 L. T. 38; *In re Musther*; *Groves v. Musther*, 43 Ch. D. 569; *In re Brown*; *Brown v. Brown*, 58 L. J. Ch. 420; 37 W. R. 472, not following *In re Smith's Trusts*, 5 Ch. D. 497, n.

Issue to stand in the place of their parents.

Where life interests are given to children, with a direction that upon the death of a child before or after the testator the corpus, the income whereof was or would have been payable to the child, is to go to his children, it is still more difficult

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to suppose that the testator intended to benefit children of a child dead at the date of the will. *In re Chinery*; *Chinery v. Hill*, 39 Ch. D. 614; *In re Wood*; *Tullett v. Colville*, (1894) 3 Ch. 381.

Where the gift was to such of the children of the testator's sisters as should survive the tenant for life, followed by a direction that in case any of such children should be dead at the testator's decease leaving issue, such issue should take the share of their deceased parent, the issue of a child dead at the date of the will was not included. *West v. Orr*, 8 Ch. D. 60; see *Giles v. Giles*, 8 Sim. 360.

Issue to take the share their parents would have been entitled to if living.

On the other hand, if the original gift is to a class, with a direction that the issue of any dying or who *shall* die in the testator's lifetime, or before the time of distribution, should take the share their parents would have been entitled to if then living, the issue of those dead at the date of the will will be admitted, as the direction amounts to an independent gift, the word share being satisfied by a distribution *per stirpes*. *Loring v. Thomas*, 1 Dr. & S. 497; *In re Chapman's Will*, 32 B. 382; *Adams v. Adams*, 14 Eq. 246; *In re Lucas' Will*, 17 Ch. D. 788; *In re Parsons*; *Blaber v. Parsons*, 8 R. 430.

This rule has been applied where the original gift was to a class living at the death of the tenant for life. *In re Woolrich*; *Harris v. Harris*, 48 L. J. Ch. 321; 11 Ch. D. 663.

*In re Potter's Trust*, 8 Eq. 52, is a more difficult case, since there the gift was to nephews and nieces, and in case of the death of any of his *said* nephews and nieces leaving issue, such issue to take the share their parents would have taken if living, the word *said* showing that the testator referred to nephews and nieces capable of taking under the will. See *Re Thompson's Trust*, 2 W. R. 218; 5 D. M. & G. 280.

Perhaps issue of parents dead at the date of the will would not be admitted where other express provision is made for such issue. *Waugh v. Waugh*, 2 M. & K. 41.

Whether the contingency of the original gift attaches to the substituted gift :—

Contingency attaching to original

When there is a life interest followed by a contingent gift to certain persons, and a gift if they die before the contingency

to their children, the contingency attaching to the gift to the parents does not attach to that to the children, and the children take vested interests, although they may not survive the contingency upon which the gift to the parents was to take effect. For instance, if the bequest is to A. for life, then to such of my nephews as may be then living, and the children of such as may be then dead, the children take vested interests upon their parents' death, whether they survive A. or not.

This is the case whether the gift to the children is an original (a) or substitutional (b) gift. *In re Pell's Trust*, 2 D. F. & J. 291; *Barker v. Barker*, 5 De G. & S. 753; *Martin v. Holgate*, L. R. 1 H. L. 175; *Re Orton's Trust*, 3 Eq. 375; *Burt v. Hellyar*, 14 Eq. 160 (a); *Masters v. Scales*, 13 B. 60; *Re Turner*, 34 L. J. Ch. 660; *Lanphier v. Buck*, 2 Dr. & Sm. 484; *Merrick's Trusts*, L. R. 1 Eq. 551; *Re Flower*; *Matheson v. Goodwyn*, 62 L. T. 677; *In re Battersby's Trusts*, (1896) 1 Ir. 600 (b). The order in *Pearson v. Stephen*, as printed in 5 Bl. N. S. 218, is inaccurate. See *Lanphier v. Buck*; *Re Flower*, *supra*.

There may be a context showing that the contingency was to apply to the children. *Bennett v. Merriman*, 6 B. 360; *Kirkman's Trust*, 3 De G. & J. 558.

There is, however, this difference between a substitutional and original gift to the children, that in the former case only those children who survive their parent will take, while in the latter all the children will take, whether they survive the parent or not. "The substitution takes place at the death of the nephew or niece. And then I see very good ground for saying there, by reason of its being substitution, you will not substitute dead people for the nephew or niece who has been living up to that time and has then just died." *Lanphier v. Buck*, 2 Dr. & Sm. 484; 34 L. J. Ch. 657; *Harcourt v. Harcourt*, 26 L. J. Ch. 536; *Re Turner*, 34 L. J. Ch. 660; *Merrick's Trusts*, L. R. 1 Eq. 551; *Thompson v. Clive*, 23 B. 282; *Crause v. Cooper*, 1 J. & H. 207; *Bennett's Trusts*, 3 K. & J. 280; *Hurry v. Hurry*, 10 Eq. 346; *Hobgen v. Neale*, 11 Eq. 48; *Heasman v. Pearse*, 11 Eq. 522; 7 Ch. 275; not following *Humfrey v. Humfrey*, 2 Dr. & S. 49.

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legatees does  
not attach to  
substituted  
legatees.

Substituted  
legatees in  
order to take  
must survive  
their ancestor.

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In the case of an original gift, if the gift be to children then living and the issue of those then dead leaving issue, the words "leaving issue" are not enough to show that only issue who survive their parent were intended to take. *In re Smith's Trusts*, 7 Ch. D. 665.

Upon a similar principle, under a gift in certain events to a class and the issue of such of them as shall then be dead, members of the class dying without issue before the events happen take a share. *In re Wood*; *Moore v. Bailey*, 29 W. R. 171; see *Strother v. Dutton*, 1 De G. & J. 675.

Whether the original and substituted class are mutually exclusive:—

Whether  
original and  
substituted  
legatees can  
take together.

When the gift is to a class or their issue, the further question arises whether the original and substituted legatees form two mutually exclusive classes, so that no substituted legatees can take if there are any members of the original class to take, or whether the issue of members of the original class dying can take with the surviving members of the original class.

Where all the  
original  
legatees  
survive.

It is clear that if all the original class survive the time of distribution, they alone take. *Sparks v. Restal*, 24 B. 218; *Margetson v. Hall*, 10 Jur. N. S. 89; 12 W. R. 334.

Where none  
of the original  
legatees  
survive.

So, if none of the original class survive the time of distribution, the substituted legatees alone take. *Willis v. Plaskett*, 4 B. 208; *Timins v. Stackhouse*, 27 B. 434; *Bolitho v. Hillyar*, 34 B. 150; *Attwood v. Alford*, L. R. 2 Eq. 479.

Where some  
original  
legatees die.

But if some of the original class die leaving children and others survive the time of distribution:—

If the gift is to several persons nominatim as tenants in common or their children, those who survive the time of distribution take, together with the children of those who die before it. *Price v. Lockley*, 6 B. 180.

In the same way, in the case of a simple substitutional gift to children or their issue to be divided amongst them in equal shares, the issue of a child dying after the testator and before the time of distribution take with the other children. *Finlason v. Tatlock*, 9 Eq. 258; *Neilson v. Monro*, 27 W. R. 936; *In re Sibley's Trusts*, 5 Ch. D. 494; see *Holland v. Wood*, 11 Eq. 91.

How the class of substituted legatees is to be ascertained, when the gift is to A. for life, then to B. or his issue :—

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1. If B. dies in the testator's lifetime, the class is ascertained at the testator's death. *Ive v. King*, 16 B. 46.
2. If B. survives the testator and dies in the lifetime of the tenant for life, the class is ascertained at B.'s death. *Ive v. King*, 16 B. 46; *Hobgen v. Neale*, 11 Eq. 48.

When the class of substituted legatees is to be ascertained.

But the class is not to be definitely ascertained at those times, but will open to let in issue born afterwards and before the time of distribution. *In re Sibley's Trusts*, 5 Ch. D. 494; *In re Jones's Estate*, 47 L. J. Ch. 775, overruling on this point *Hobgen v. Neale*, *supra*. See *ante*, p. 293.

In some cases of substitutional gifts, where issue are substituted and a member of the original class dies leaving issue, and then some or all the other members of the original class die without issue before the time of distribution, the question has arisen what share the issue of the one first dying take. See *Eyre v. Marsden*, 2 Kee. 564; 4 M. & Cr. 231; *Le Jeune v. Le Jeune*, 2 Kee. 701; *Ashling v. Knowles*, 3 Dr. 593; *Cross v. Maltby*, 20 Eq. 378.

## CHAPTER XL.

## SURVIVORSHIP AND SURVIVORS.

## I. SURVIVOR AS A WORD OF LIMITATION.

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THE word survivor may be either a word of limitation of an estate, denoting the interest certain persons are to take, or it may denote a class of persons.

Survivor used  
as a word of  
limitation of  
an estate.

For instance, in a devise to A., B., and C. as tenants in common for life, with benefit of survivorship, the word survivorship refers to the extent of the estate and not to the class of persons, and upon the death of one the remaining tenants in common take the whole estate. *Haddelsey v. Adams*, 22 B. 266; *Taaffe v. Conmee*, 10 H. L. 64; see, however, *Wiley v. Chantepedrix*, (1894) 1 Ir. 209.

The word cannot be a word of limitation where absolute interests are given. *Maberley v. Strode*, 3 Ves. 450; *Foley v. Gallagher*, 2 L. R. Ir. 389.

## II. GIFTS TO SURVIVORS.

Survivors  
denoting  
persons to  
take.

The word survivors is more usually employed to denote a class of persons who are to take, and in such cases it must have its natural meaning, which is to outlive; that is to say, to be alive at and after the happening of a particular event or the death of a particular person, which event or person the other is to survive. *Gee v. Liddell*, L. R. 2 Eq. 341; see *Re Clark's Estate*, 3 D. J. & S. 111, where "survive" was held to mean merely "live after."

A single  
survivor

A divesting clause in favour of survivors operates in favour of a single survivor. *Hearn v. Baker*, 2 K. & J. 383;

*Bowyer v. Currall*, 2 W. R. 328; *Bowyer v. Douglass*, W. N. 1876, 279. Chap. XL.

takes under  
a gift to  
survivors.

The principal difficulty with reference to survivorship clauses is to ascertain to what point of time the survivorship refers:—

1. In simple cases where the gift is to several or the survivors, or to several and the survivors or the survivors of them, or to a class described as surviving, such as surviving children, or to several or a class with benefit of survivorship, or with benefit of survivorship between them, the rule is now well settled that survivorship is to be referred to the time when the property or fund is divisible, and those then living will take the whole. As to the similarity in effect of these different expressions, see *Wiley v. Chanteperdrix*, (1894) 1 Ir. 209. Simple gift to several or the survivors refers to the time of division.

“Survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy.” *Cripps v. Woolcott*, 4 Mad. 11.

This is the case whether the only gift is in the direction to divide, as in *Cripps v. Woolcott*, or whether there is already a prior complete gift independent of that direction. *Hearn v. Baker*, 2 K. & J. 983.

The same rule applies to realty as to personalty. *In re Gregson*, 2 D. J. & S. 428; *In re Belfast Town Council*; *Ex parte Sayers*, 13 L. R. Ir. 169.

Therefore a direct gift to several, or to the survivors, goes to those who survive the testator. *Stringer v. Phillips*, 1 Eq. Ca. Ab. 292. Direct gift to several or survivors.

If there is an immediate gift to several with benefit of survivorship, payable at twenty-one, survivorship may be referred to that age, so that the share of one dying under twenty-one goes to the survivors. *Forrester v. Smith*, 2 Ir. Ch. 70.

If there is a life interest those who survive the tenant for life take the whole. *Pope v. Whitcombe*, 3 Russ. 124; *Blewitt v. Roberts*, 10 Sim. 491; *Cr. & P. 274*; *Neathway v. Reed*, 3 Gift after life interest.

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D. M. & G. 18; *McDonald v. Bryce*, 16 B. 581; *In re Cranchall's Trust*, 8 D. M. & G. 480; *Taylor v. Beverley*, 1 Coll. 108; *Hearn v. Baker*, 2 K. & J. 383; *In re Pritchard's Trusts*, 3 Dr. 163; *Naylor v. Robson*, 34 B. 571.

The result is the same if the expression used is, if any die to the survivors, when the death referred to must be death before the tenant for life. *Whitton v. Field*, 9 B. 368.

Death of  
tenant for  
life before  
testator.

If the tenant for life dies before the testator, those who survive the testator take the whole. *Spurrell v. Spurrell*, 11 Ha. 54.

Gift to class  
when the  
youngest  
attains 21,  
with benefit  
of survivor-  
ship.

On the same principle, if there is a gift to a class when the youngest attains twenty-one, with benefit of survivorship, those living when the youngest attains twenty-one are entitled. *Vorley v. Richardson*, 8 D. M. & G. 126.

If there is a gift to a tenant for life with remainder to his children who attain twenty-one, and if there are none to a class of survivors, the survivors are ascertained at the death of the tenant for life, or when his last child dies under twenty-one, whichever last happens. *Carrer v. Burgess*, 7 D. M. & G. 96.

Several life  
tenancies.

If there are several life tenancies the survivors are ascertained at the death of the last surviving tenant for life. *Re Fox's Will*, 35 B. 163; *Howard v. Collins*, 5 Eq. 349.

Gift after life  
interest to  
survivors to  
be paid at 21.

If the gift is after a life interest to survivors to be paid at twenty-one, or some similar direction as to attaining a given age, the question is whether the survivorship refers to the death of the tenant for life or to the attainment of the given age. *Primâ facie*, it refers to the former. *Pope v. Whitcombe*, 3 Russ. 124; *Huffam v. Hubbard*, 16 B. 579; *Turing v. Turing*, 15 Sim. 189; *Lill v. Lill*, 23 B. 446; *Shaw v. Shaw*, 25 L. R. Ir. 30.

But the words of survivorship may be so connected with the direction for payment at twenty-one as to show that by survivors is meant those who attain twenty-one. For instance, if after a life interest the gift is to a class with benefit of survivorship upon their attaining twenty-one or to be paid upon their attaining twenty-one with benefit of survivorship among them. *Knight v. Knight*, 25 B. 111; *Berry v. Briant*, 2 Dr. & S.



1; *Tribe v. Newland*, 5 De G. & S. 236; see *Crozier v. Fisher*, Chap. XL.  
4 Russ. 399; *Daniel v. Gosset*, 19 B. 478.

In such cases a gift over, if all the beneficiaries die before the tenant for life, affords strong reason to suppose that survivorship refers to the death of the tenant for life (a); on the other hand, if the gift over is upon death of all before the given age, there is equally strong reason to suppose that survivorship refers to the age (b). *Daniel v. Gosset*, 19 B. 478; *Fisher v. Moore*, 1 Jur. N. S. 1011 (a); *Salisbury v. Lamb*, 1 Ed. 465; Amb. 383; *Bouverie v. Bouverie*, 2 Ph. 349; *Alty v. Moss*, 34 L. T. 312 (b). Effect of gift over.

There may be sufficient in the will to show that in these cases survivorship does not refer to the time of division but to some other time. Contrary intention.

For instance, if the gift is after a life interest to surviving brothers or *their* issue, surviving may mean living at the testator's death (a); and after a gift to two tenants for life a gift to the surviving children of the second tenant for life may mean his children living at his death (b). *Shailer v. Groves*, 2 Jar. 1548 (a); *Drakeford v. Drakeford*, 33 B. 43 (b).

And in a similar case a gift to surviving children or their heirs and assigns shows that the children were intended to take before the death of the tenant for life. *Re Hopkins' Trust*, 2 H. & M. 411; *In re Stannard*; *Stannard v. Burt*, 52 L. J. Ch. 355.

There may be other circumstances sufficient to take the case out of the ordinary rule. See *Rogers v. Towsie*, 9 Jur. 575; *Blackmore v. Snee*, 1 De G. & J. 455; *Evans v. Evans*, 25 B. 81.

Probably some of the earlier authorities, where survivorship in the case of future gifts was referred to the testator's death, are not in accordance with the views which now prevail. See *Rose d. Vere v. Hill*, 3 Burr. 1881; *Wilson v. Bayly*, 3 B. P. C. 195; *Roebuck v. Dean*, 2 Ves. Jun. 265; *Maberley v. Strode*, 3 Ves. 450; *Brown v. Bigg*, 7 Ves. 279; *Edwards v. Symons*, 6 Taunt. 213; *Doe d. Long v. Trigg*, 8 B. & Cr. 231. Early cases not consistent with present rule.

2. If the gift is not simply to several or the survivors after a life interest but to several, and if any die before the tenant Case where gift to survivors is if

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any die before  
the tenant  
for life.

for life to the survivors, the case is different. It is then a question of construction whether survivorship is intended between the legatees or whether it refers to the time of distribution. Not much assistance can be got from the cases. If the gift is to the survivor of them this indicates survivorship between the legatees (*a*); if it is to the survivor, his executors, administrators, and assigns, this indicates that the survivor was to take though he might not survive the time of distribution (*b*); or again, if the gift is if any of the legatees die before the tenant for life to his children, and if none to the survivors as the children are to be ascertained at the death of the legatee dying, so are the survivors (*c*). *Scurfield v. Howes*, 3 B. C. C. 90 (*a*); *White v. Baker*, 2 D. F. & J. 55 (*b*); *Ive v. King*, 16 B. 46, 57 (*c*).

On the other hand, if the gift is after the death of a tenant for life to seven persons to be divided, share and share alike, the share of each who shall happen to die to be equally divided among the survivors (*a*) or to two legatees, and if either of them shall be then dead, to the survivor (*b*), the time of division or the death of the tenant for life seems to be the leading idea in the testator's mind, and those then living take. *Cambridge v. Rous*, 25 B. 409 (*a*); *In re Pickworth*; *Snaith v. Parkinson*, (1899) 1 Ch. 642 (*b*); see *Pain v. Benson*, 3 Atk. 78; *Littlejohns v. Household*, 21 B. 29; *Marriott v. Abell*, 7 Eq. 478; *In re Hill to Chapman*, 38 W. R. 570; 54 L. J. Ch. 595.

In *Bright v. Rowe*, 3 M. & K. 316, where the portion of any child who should die before it should become payable was given to the survivors and the share became payable on the father's death, it was held that on the death of a child before the father his share went to those then living.

Gift to sur-  
vivors upon  
death without  
issue before  
time of  
distribution.

3. If the gift to survivors is not simply upon death before the time of distribution but upon death before that time without issue or under a given age, the case is more complicated. The question is, does the survivorship refer to the time of distribution, or does it refer to the death without issue or under age, as the case may be.

The former is no doubt the more convenient construction. If the other is adopted and the class is numerous there may

be difficulties as to accrued shares, and the property may be divisible in small fractions.

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The determination of the question must depend upon the collocation of the words.

The fact that the gift to the survivors is the gift of the whole fund and not merely of the share of the person dying supports the view that the fund is to be divisible once for all among a class ascertained at the time of distribution. *Watson v. England*, 15 Sim. 1.

In *Crowder v. Stone*, 3 Russ. 217, there was a life interest and then a gift to five beneficiaries, with a gift over in case of the death of any of them without issue before their shares should become payable to the survivors; and it was held that the survivors were to be ascertained when the death without issue happened. In *Young v. Robertson*, 4 Macq. 314; 8 Jur. N. S. 825 (a Scotch case), upon similar words, survivors was held to mean those living at the time of distribution. See, too, *Essex v. Clement*, 30 B. 525.

If there is a gift if any die leaving issue before the time of payment to the issue, and if not to the survivors, there is ground for saying that as the issue must be ascertained at the death of the parent, so must the survivors be. *Wilmot v. Flewitt*, 13 W. R. 856; 11 Jur. N. S. 820.

4. If the gift to survivors is not limited to the period of a life tenancy but is to take effect upon the happening of some event, the survivors must be ascertained whenever the event happens.

Gift to survivors not limited to any period.

Thus, if there is a direct gift to several persons and a gift over if any die under twenty-one to the survivors, survivors means those living when a child dies under twenty-one. *Ex parte West*, 1 B. C. C. 575; *Rickett v. Guillemard*, 12 Sim. 88.

And it would seem that an immediate gift to several, with benefit of survivorship if any die without issue, could not be limited to death without issue in the testator's lifetime unless there is an assisting context. See *Doe d. Lifford v. Sparrow*, 13 East, 359; *Bowers v. Bowers*, 5 Ch. 244.

If the gift to survivors is upon death without issue, and there is a life interest, though the gift over is not in terms

Chap. XL. limited to death without issue before the tenant for life, there may be circumstances, such as an intention that the legatees are to have control of their shares at the time of distribution, which show that this is the true construction. *Jenour v. Jenour*, 10 Ves. 562; *Clark v. Henry*, 6 Ch. 588; *Besant v. Cox*, 6 Ch. D. 604.

### III. WHEN SURVIVORS MEANS OTHERS.

Gift to several, and if any die without issue to the survivors.

1. If there is an absolute gift to several persons with a gift to the survivors, if any die without issue, survivors must be construed in its ordinary sense. *Crowder v. Stone*, 3 Russ. 217; *Ranelagh v. Ranelagh*, 2 M. & K. 441; *Stead v. Platt*, 18 B. 50; *Greenwood v. Percy*, 26 B. 572.

Gifts to be paid at 21, with a gift over if all die under 21.

2. Where there is a gift over to take place only in case the event on which the property is limited to the first legatees, among whom there is to be survivorship, fails to happen in respect of all the legatees, survivor will be construed other, so as not to cause an intestacy. For instance, if the bequests are to A., B., and C., payable at twenty-one, and if either die under twenty-one, his share to the survivors, and if two die under twenty-one, the whole to the survivor, and if all die under twenty-one, then over; the share of one dying under twenty-one would go to one who had predeceased him but attained twenty-one and to the survivor equally. *Wilmot v. Wilmot*, 8 Ves. 10; *In re Jackson's Trust*, 14 Ir. Ch. 472; followed in *In re Connellan's Trust*, 16 Ir. Ch. 524, though there was no gift over, but *quære*.

Survivorship between tenants in tail referred to the *stirpes*.

3. Where there is a devise to sons and the heirs of their bodies, and, if any die without issue, to the survivors and the heirs of their bodies, and if all die without issue over, survivorship will be referred to the *stirpes* and not to the first takers, and the share of a son dying without issue will go among the issue of a son previously deceased and the surviving sons. *Doe v. Wainewright*, 5 T. R. 427; *Smith v. Osborne*, 6 H. L. 376.

In such cases the testator has expressed his intention of benefiting the line of issue, and the survivorship contemplated is one between the respective *stirpes* and not between the first takers merely, and this, coupled with the gift over, which can

only take effect if all the sons die without issue, is sufficient to enlarge the meaning of the word survivor.

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In such a case there may be enough in the will to show that survivors means others even without a gift over if all die without issue. *Williams v. James*, 20 W. R. 1010; see *Tufnell v. Borrell*, 20 Eq. 194.

4. If there are devisees to several for their lives with remainder to their issue, and if any die without issue, to the surviving tenants for life for their lives with remainder to their issue, with an ultimate gift over; if all the tenants for life die without issue survivors will be read as others. *Cole v. Sewell*, 4 D. & War. 1; 2 H. L. 186; *In re Tharp's Estate*, 1 D. J. & S. 458; *In re Row's Estate*, 58 L. J. Ch. 347; *Askew v. Askew*, 57 L. J. Ch. 629; 58 L. T. 472; 36 W. R. 620.

Gifts for life, remainder to issue in default to surviving tenants for life.

Similarly, as regards personalty, if life interests are given with remainder to the issue of each tenant for life, with a gift over on the death of any tenant for life without issue to the surviving tenants for life for their lives, and then to their issue or to the surviving tenants for life in like manner as their original shares were given, and an ultimate gift over on failure of issue of all the tenants for life, survivors will be read as equivalent to others. *Low v. Land*, 1 Jur. 377; *Holland v. Alsop*, 29 B. 498; *In re Keep's Will*, 32 B. 122; *In re Tharp's Estate*, 1 D. J. & S. 458; *Hurry v. Morgan*, 3 Eq. 152; *Badger v. Gregory*, 8 Eq. 78; *Waite v. Littlewood*, 8 Ch. 70; *In re Palmer's Trusts*, 19 Eq. 320; *Wake v. Varah*, 2 Ch. D. 348.

It matters not whether the words used are "survivors" or "such as survive." *In re Tharp's Estate*, 1 D. J. & S. 458.

In such a case survivors will be read as others and not as surviving in person or in stock. For instance, if a tenant for life dies leaving children who die, and another tenant for life then dies without children, the deceased children of the first tenant for life will take. *Lucena v. Lucena*, 7 Ch. D. 255; *O'Brien v. O'Brien*, (1896) 2 Ir. 459.

Survivors means others not surviving by stock.

In these cases the gift over shows that the fund is to go over as a whole, and only if there is a failure of issue of all the tenants for life; yet if survivors were read strictly, if a tenant for life died leaving issue, and the last tenant for life

Whether gift over essential.

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died without issue, the gift over could not take effect, as there has not been a total failure of issue; at the same time the issue of the tenant for life who died first could not take, so there would be an intestacy. If there is no gift over survivors must be strictly construed, unless there is some other evidence of intention to give it a different meaning. *In re Horner's Estate*; *Pomfret v. Graham*, 19 Ch. D. 186; *In re Benn*; *Benn v. Benn*, 29 Ch. D. 889.

Not material whether shares settled expressly or by reference.

It can make no difference whether the shares given over to the surviving tenants for life are settled by express limitations or are only settled by reference to the limitations of the original shares. *Milsom v. Awdry*, 5 Ves. 465; *Beckwith v. Beckwith*, 46 L. J. Ch. 97; 25 W. R. 282; 36 L. T. 128.

The cases of *Hodge v. Foot*, 34 B. 349; *In re Arnold's Trusts*, 10 Eq. 252; *In re Walker's Estate*; *Church v. Tyacke*, 12 Ch. D. 205; see 19 Ch. D. 186, are not consistent with the more recent authorities.

Intention to include children of deceased tenant for life.

Even if there is no gift over there may be enough in the will to show that children of a tenant for life who does not survive the event upon which the gift over takes effect are to share; for instance, if the gift over is to "surviving sisters and their respective children" in the same manner as their original shares, which was read as equivalent to surviving sisters and the children of all the sisters (a); or if there is a direction that children are to take the share their parent would have taken if living (b). *In re Bowman*; *Whytehead v. Boulton*, 41 Ch. D. 525 (a); *In re Blantern*; *Lowe v. Cooke*, W. N. 1891, 54 (b).

There may, of course, be other circumstances to show that survivors is not used in a strict sense. *Hawkins v. Hammerton*, 16 Sim. 410; *In re Beck's Trusts*, 16 W. R. 189.

*Eyre v. Marsden*.

In *Eyre v. Marsden*, 4 M. & Cr. 231, the construction was assisted by the fact that there was a gift to grandchildren living at the testator's death, with a postponement of payment and a direction that in case any of the grandchildren should die before their shares should be payable leaving issue, the issue should take the share the parent would have taken if

then living. There was then a gift over, in case any of the grandchildren should die without leaving issue before becoming entitled to receive their shares to surviving grandchildren, to be paid at the same time and in the same manner as the original shares. The issue of a grandchild who did not survive came in under the earlier clause, as they were to take the share their parent would have taken if living. See per Wood, V.-C., in *Re Corbett's Trusts*, Jo. p. 597.

5. If there is no settlement of the shares of tenants for life dying without issue, survivors must be construed strictly.

No settlement  
of shares  
given over.

For instance, as regards realty, if there are devises to nieces for life with remainder to their issue in tail, with a gift if any of the nieces die without issue to the surviving nieces, not for life but in tail, surviving cannot be read others, even though there is a gift over, if all the tenants for life die without issue. *Lee v. Stone*, 1 Ex. 674; *Maden v. Taylor*, 45 L. J. Ch. 569; *King v. Frost*, 15 App. C. 548; see *Cooper v. Macdonald*, 16 Eq. 258.

The same applies in the case of similar limitations of personalty to the surviving tenants for life absolutely, whether there is (a) or is not (b) a gift over in default of issue of all the tenants for life. *Browne v. Rainsford*, 1 R. 1 Eq. 384; *Twist v. Herbert*, 28 L. T. 489 (a); *Leeming v. Sherratt*, 2 Ha. 14; *Re Corbett's Trusts* (the residue), Jo. 591 (b).

Nor can survivors be read others where the gift over is not to the surviving tenants for life, but to the children of the surviving tenants for life. *In re Dunlery's Trusts*, 9 L. R. Ir. 349; *Re Rubbins*; *Gill v. Worrall*, 79 L. T. 313.

6. In some cases the question has arisen whether, if the shares of daughters are settled and the shares of sons not, and the daughters' shares in default of children are given to the surviving sons and daughters, the daughters' accruing shares being settled as before, surviving can be read other. It can be so read if there is an ultimate gift over on a total failure of issue (a), but otherwise not (b). *Lucena v. Lucena*, 7 Ch. D. 255 (a); *De Garagnol v. Liardet*, 32 B. 608; *Re Usticke*, 35 B. 338; see *Jackson v. Sparks*, 38 L. J. Ch. 75 (b).

Some shares  
settled,  
others not.

7. It was at one time supposed that when there were gifts to several for life, with remainder to their children, and if

Whether last  
survivor takes  
absolutely.

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any died without children to the surviving tenants for life absolutely, the last tenant for life dying without children took his share absolutely as the longest liver, though he did not survive the event. But this construction is now overruled, and the share of the last survivor dying without children goes over and either falls into residue or lapses. *Nevill v. Boddam*, 28 B. 554; *In re Mortimer*; *Griffiths v. Mortimer*, 52 L. T. 383; 54 L. J. Ch. 414; *Askew v. Askew*, 58 L. T. 472; 57 L. J. Ch. 629; 36 W. R. 620; *King v. Frost*, 15 App. C. 548; *Ranelagh v. Ranelagh*, 41 W. R. 549; 3 R. 315; overruling *Maden v. Taylor*, 45 L. J. Ch. 569; *Davidson v. Kimpton*, 18 Ch. D. 218; *In re Roper*; *Morrell v. Gissing*, 41 Ch. D. 409; *In re Hutchins*, 19 L. R. Ir. 215.

“Others”  
not read  
survivors.

8. Under a gift in default of children of a daughter to the others or other of his children by name, equally between them if more than one, the word others will not be read as survivors. *In re Hagen's Trusts*, 46 L. J. Ch. 665; see *In re Chaston*; *Chaston v. Seago*, 18 Ch. D. 218.

Nor under a gift to a son by name and the survivors of the testator's daughters is it necessary that the son should survive in order to take. *In re Bates*, 11 W. R. 768.



## CHAPTER XLI.

## THE CONSTRUCTION OF GIFTS OVER.

## GIFTS OVER UPON DEATH BEFORE VESTING.

If there is a gift to A. with a direction that it is to vest at twenty-one, with a gift over if A. dies without attaining a vested interest, the gift over takes effect if A. dies before the testator, though he may have attained twenty-one. He, in fact, dies without attaining a vested interest, and the Court will not construe the gift over as referring only to death under twenty-one. *In re Gaitskell's Trusts*, 15 Eq. 386.

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Death before vesting includes death before testator after age for vesting.

A gift over upon the death of the legatees before attaining a vested interest refers *primâ facie* to death before vesting in interest.

Vesting *primâ facie* refers to vesting in interest.

This is the case whether the gift be immediate or in remainder. *Parkin v. Hodgkinson*, 15 Sim. 293; *Re Arnold's Estate*, 33 B. 163; *Richardson v. Power*, 19 C. B. N. S. 780.

If, however, the gift over be to persons living at the time of distribution, there is a strong argument that the word vested was used as equivalent to vested in possession. *Young v. Robertson*, 4 Macq. 314; 8 Jur. N. S. 825; *Greenhalgh v. Bates*, 2 P. & D. 47.

When the gift over is to persons living at the time of distribution.

So, if the legacies would be vested in interest at the testator's death, and the gift over is, if any of the legatees die during the testator's life or after his decease, without attaining vested interests, vested must mean vested in possession. *King v. Cullen*, 2 De G. & S. 252.

And, in the same way, the testator may show that he used "vested" in the gift over, as equivalent to "paid," if the gift over is if any die before their share should be vested as

"Vested" used as equivalent to "paid."

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aforesaid, when only directions as to payments have been previously given. *Sillick v. Booth*, 1 Y. & C. C. 121, 126.

If the testator expressly provides for the death of the legatees in his lifetime, a gift over upon death before vesting refers to vesting in possession. *In re Morris*, 5 W. R. 423.

## GIFTS OVER UPON DEATH BEFORE PAYMENT.

Gift over upon death before payment after an immediate gift with a time of payment.

A. In the case of a direct gift, followed by a gift over, if any of the legatees die before their legacies are payable:

1. If a time for payment is appointed, the gift over takes effect:—

a. If the prior legatee dies in the testator's lifetime, whether after the age fixed for payment or not. *Walker v. Main*, 1 J. & W. 1; *Humphreys v. Howes*, 1 R. & M. 689; *In re Gaitskell's Trusts*, 15 Eq. 386.

b. If the prior legatee survives the testator, but dies before the time fixed for payment. *Jenkins v. Jenkins*, Belt's Supplement, 264; *Rammell v. Gillow*, 9 Jur. 704; and see *Woodburne v. Woodburne*, 3 De G. & S. 643.

Where no period for payment is appointed.

2. If no time is fixed, payable refers to the testator's death. *Rammell v. Gillow*, 9 Jur. 704; *Collins v. Macpherson*, 2 Sim. 87; *Cort v. Winder*, 1 Coll. 320.

Gift over upon death before payment where there is a life interest.

B. If there is a life interest, followed by a bequest to certain persons, and a gift over in the event of death before the respective legacies become payable, no time being appointed for division or payment, the gift over takes effect with respect to those legatees who die before the tenant for life. *Crowder v. Stone*, 3 Russ. 217; *Creswick v. Gaskell*, 16 B. 577.

Meaning of the word "entitled."

The word entitled, however, is more easily susceptible of the meaning vested than the word payable, and it will accordingly be taken to mean entitled in right and not in possession, and referred to the death of the testator and not of the tenant for life, if the latter meaning would have the effect of divesting a previously vested gift. *Commissioners of Charitable Donations v. Cotter*, 2 D. & Wal. 615; 1 D. & War. 498; *Henderson v. Kennicott*, 2 De G. & S. 492; *Re Crosland*; *Craig v. Midgley*, 54 L. T. 238. See *Beale v. Connolly*, 1 R. 8 Eq. 412; *Jopp v.*

*Wood*, 28 B. 53; 2 D. J. & S. 323; but see *In re Noyce*; **Chap. XII.**  
*Brown v. Rigg*, 31 Ch. D. 75.

C. If there is a life interest as well as a time of payment, the question is more complicated.

The most numerous cases on this head have occurred in marriage settlements, where, in addition to the leaning in favour of vesting, the Court is assisted by the legal presumption that the children were intended to be provided for at the time when their portions were wanted, whether they survived the tenant for life or not. See *Emperor v. Rolfe*, 1 Ves. Sen. 208; *Wakefield v. Maffet*, 10 App. C. 422.

The same rules of construction are, however, applicable to wills. At the same time, it must be remembered that the tendency of the Court at the present day is to give words their natural meaning, and it is probable that many of the old authorities cited below would not now be followed. See *Leader v. Duffey*, 13 App. C. 294. The cases may be classified under the following heads:—

1. If there is a gift to A. for life, followed by a bequest to his children, whether at twenty-one, or payable at twenty-one, with a gift over on death before the legacy is payable, the gift over is good as regards legatees who die in the testator's lifetime, whether under or over twenty-one. *Walker v. Main*, 1 J. & W. 1; the share of Mary Main, who it appears had attained twenty-one. See *In re Gaitskell's Trusts*, 15 Eq. 386.

2. If there is a gift to A. for life followed by a contingent bequest to his children, as, for instance, to the children at twenty-one, or to be vested at twenty-one, and a gift over in the event of death before the shares are payable, if the word payable were taken in its ordinary meaning as referring to the time at which the money is actually distributable, it would involve the double contingency of surviving the tenant for life and attaining twenty-one, and therefore the Court confines it to the latter, which is the event when the bequest is most likely to be required, and this is the case whether there is provision for the issue of the children or not. *Mendham v. Williams*, L. R. 2 Eq. 396; *Mocatta v. Lindo*, 9 Sim. 56; *Jones v. Jones*, 13 Sim. 561; *Bouverie v. Bouverie*, 2 Ph. 349; *In re*

Effect of gift over upon death before payment when there is a life interest and a time of payment.

Effect of the death of the legatee before the testator.

Bequest contingent upon attaining 21 is indefeasible at that age.

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*Crofton's Trusts*, 7 L. R. Ir. 279; *Wakefield v. Richardson*, 13 L. R. Ir. 17; *S. C. Wakefield v. Maffet*, 10 App. C. 422; *Partridge v. Baylis*, 17 Ch. D. 835.

The same will be the case whether the word used is "received" or "receivable:" *West v. Miller*, 6 Eq. 59; *Dodgson's Trust*, 1 Dr. 440; or "entitled in possession," or "entitled to the receipt," or "entitled to payment," or "before they have received or become possessed." *Re Yates' Trust*, 21 L. J. Ch. 281; *Hayward v. James*, 28 B. 523; *Re Williams*, 12 B. 317; *Rammell v. Gillow*, 9 Jur. 704.

Effect of gift over to issue of those dying before the time of payment when the shares are to be vested at marriage.

3. When the shares of daughters are directed to be vested at twenty-one, or marriage, and there is a gift over, if any of the legatees die before their shares are payable, to their issue, it is more difficult to construe payable as meaning vested, since a daughter could not die leaving issue before her share becomes payable if "payable" means "vested." The cases are conflicting. *Mendham v. Williams*, L. R. 2 Eq. 396; *Day v. Radcliffe*, 3 Ch. D. 654.

When there is a vested gift to be paid at 21.

4. Where the gift to the children is vested at birth and payment only is postponed, and there is no provision for the issue of the children and a gift over in the event of death before the shares become payable: as, for instance, to A. for life and then to his children, to be divided at twenty-one, with a gift over if any die before their shares are payable, in this case payable will be held to mean attaining twenty-one, for otherwise the issue of those children would not take who died in the lifetime of the tenant for life over twenty-one. *Hallifax v. Wilson*, 16 Ves. 168; *Walker v. Main*, 1 J. & W. 1; *Salisbury v. Lamb*, 1 Ed. 465; *Re Williams*, 12 B. 317; *Hayward v. James*, 28 B. 523; *Wakefield v. Maffet*, 10 App. C. 422.

The construction will be the same where the issue only of such children are provided for as die under twenty-one. *Mocatta v. Lando*, 9 Sim. 56.

When the issue of those dying before the period of distribution are provided for in all events.

If, however, there is after a bequest for life a bequest to children vested at their births, and the time of division is alone postponed with provision for the issue of children dying at any time during the life of the tenant for life, and a gift over if they die before the legacies become payable, the word payable

will bear its ordinary meaning and refer to the death of the tenant for life.

For instance, if the gift be to A. for life, then to her children, to be transferred to them at twenty-one, and if any die before their shares are payable, leaving issue, to such issue, and if any die before their shares are payable without issue over, since the fund becomes actually payable on the death of the tenant for life, and there is no reason to adopt any other construction in order to favour the issue, who are already provided for, the gift over will be good on the death of the legatees during the life of the tenant for life, though they may have attained twenty-one. *Wilmott's Trusts*, 7 Eq. 582; *Chell v. Chell*, 23 W. R. 252.

It may, however, be noticed that the construction of payable, as referring to the age of twenty-one, especially in cases under the first head, is materially assisted by such words as "to be paid," or "payable" at twenty-one, and "it is no strain to understand the testator as adverting merely to the age of twenty-one, which he had just before appointed as the period of payment." *Hallifax v. Wilson*, 16 Ves. 168.

Effect of the collocation of words upon the construction.

5. If the death of the tenant for life is the earliest time at which the gift can be payable; if, for instance, the gift is to such as survive the tenant for life, to be paid at twenty-one, with a gift over upon death before the shares become payable; the word payable would in all probability receive its ordinary meaning and be referred to the time of distribution. *Bielefield v. Record*, 2 Sim. 354.

When the original gift is contingent upon surviving the tenant for life, "payable" bears its ordinary meaning.

#### GIFTS OVER UPON DEATH BEFORE ACTUALLY RECEIVING THE LEGACY.

1. When it is clear that the testator refers only to legatees living at his death and there is a gift over if any die before their shares are payable or before receiving their shares, the gift over cannot refer to death in the lifetime of the testator. *Kindersley, V.-C.*, in such a case, held that the gift over was good with regard to the shares of those who died within a year after the testator's death; but, apparently, the Court would inquire at what time the money might have been paid

Gift to persons living at the testator's death, with a gift over upon death before payment.

**Chap. XLI.** *In re Arrowsmith's Trusts*, 29 L. J. Ch. 775; 6 Jur. N. S. 1281; on appl., 2 D. F. & J. 474; *In re Chaston*; *Chaston v. Seago*, 18 Ch. D. 218.

2. In the same way under an immediate bequest with a gift over upon death "before me or before the division or final division of my estate," the gift over takes effect upon the shares of legatees dying within a year from the testator's death. *In re Collison*; *Collison v. Barber*, 12 Ch. D. 834; *In re Wilkins*; *Spencer v. Duckworth*, 18 Ch. D. 634. See *In re Potts*; *Hooley v. Fountain*, W. N. 1884, 106.

Death before  
receipt.

3. Where the bequest is after a life interest, with a gift over on death before the legatee receives his legacy, the gift over does not take effect if the legatee survives the tenant for life. *Re Dodgson's Trust*, 1 Drew. 440; *Whiting v. Force*, 2 B. 571; *Wilks v. Bannister*, 30 Ch. D. 512.

Although there can be no justification, except that of avoiding inconvenience, for construing "received" or "paid" as equivalent to "receivable" or "payable," yet there is more plausibility in saying that receipt by a trustee, where the cestui que trust is absolutely entitled, may be treated as equivalent to receipt by the cestui que trust himself. See *Minors v. Battison*, 1 App. C. 428.

Actual pay-  
ment or  
receipt.

4. Where, however, the gift over is in the event of death before the legacy is actually paid or received, or other words are used which import the transfer of property from the executor or trustee to the legatee, the cases are in appearance difficult to reconcile. The distinction between the effect of such gifts over in the case of a residue and in the case of a pecuniary legacy does not appear to have been adverted to; but it will be found to justify most if not all of the decisions.

a. Where a share of residue is given to a legatee, with a gift over, if the legatee dies before actual receipt of his share, it cannot be ascertained at any given time whether the gift over will take effect or not. There is no ground for treating a gift of residue as limited to the residue capable of realization within a year from the testator's death; assets may fall into it many years after that time; and an increase of the divisible residue after the legatee's death would, if the gift over is strictly

construed, bring it into operation. Such a divesting clause, therefore, is void for uncertainty. *Hutcheon v. Mannington*, 1 Ves. Jun. 366; 4 B. C. C. 491; *Martin v. Martin*, L. R. 2 Eq. 404; *Minors v. Battison*, 1 App. C. 428; *Bubb v. Padwick*, 18 Ch. D. 517. Chap. XII.

b. But the objection does not apply if, as in *Johnson v. Crook*, 12 Ch. D. 639, the gift is immediate and the gift over is only of so much as the legatee has not received at his death. Here, the question whether the gift over comes into effect is answered at the legatee's death. If his death must happen within the period fixed by the rule against perpetuities, there can be no objection on that score to the gift over, although the improbability of the testator intending such a bifurcation of his residue may afford a reason for construing the words in another sense.

c. Nor is there any objection to the gift over where, as in *Whitman v. Aitken*, L. R. 2 Eq. 414, the original gift is a pecuniary legacy, incapable of augmentation.

But the improbability of any testator intending a construction which would make the interests of beneficiaries depend upon chance, has induced the Courts to affix some other construction even to words naturally indicating an actual receipt by the legatee. See *Law v. Thompson*, 4 Russ. 92.

5. If there is a gift upon trust for sale and division among certain legatees, a gift over if any die before the sale is completed is valid. *Faulkener v. Hollingworth*, cit. 8 Ves. 559; *Elwin v. Elwin*, 8 Ves. 547; see *Bernard v. Montague*, 1 Mer. 433; see 11 Ves. 508. Death before  
sale com-  
pleted.

6. A gift over upon death before the execution of all or any of the trusts of the will is void. *Roberts v. Youle*, 49 L. J. Ch. 744. Death before  
execution of  
trusts.

Where there was a direction to convert and to hold the proceeds of conversion upon trust for the testator's children, a gift over of the share of any child who should die "during the continuance of the trusts hereinbefore declared" was held to refer to death during the continuance of certain trusts specially declared of one item of the testator's property and not to death before the complete conversion of the residue. *Re Teale*; *Teale v. Teale*, 53 L. T. 936; 34 W. R. 248.

Chap. XII.

## GIFTS OVER UPON DEATH UNMARRIED AND WITHOUT ISSUE.

Unmarried.

1. In a gift over upon death unmarried without any explanatory context, unmarried means never having been married. *Dalrymple v. Hall*, 16 Ch. D. 715; see *Blundell v. De Falbe*, 57 L. J. Ch. 576; 58 L. T. 621 (marriage settlement).

Gift over upon death unmarried and without issue when vested interests are given upon marriage.

2. Where vested interests are given at twenty-one or marriage, a gift over upon death unmarried and without issue will mean never having been married. *Heywood v. Heywood*, 29 B. 9; *Pratt v. Mathew*, 8 D. M. & G. 522; *Gonne v. Cooke*, 15 W. R. 576.

3. And, perhaps, the same construction would be adopted where the gift is to A. simply and if he dies unmarried and without issue over; the argument in favour of the construction being that A.'s interest would then be indefeasible upon his marriage. See *Heywood v. Heywood*, *supra*; see *In re Saunders' Trusts*, 3 K. & J. 152; *Radford v. Willis*, 7 Ch. 7; *Long v. Lane*, 17 L. R. Ir. 11.

The case of *Doe d. Baldwin v. Rawding*, 2 B. & Ald. 441, is not opposed to this view, since the donee there left a husband surviving her, so that upon no construction of unmarried could the gift ever take effect. The point did not arise in *Bell v. Phyn*, 7 Ves. 450.

4. Of course, if the legatee were married at the date of the will this construction would be impossible.

Unmarried may refer to a second marriage.

In *Crosthwaite v. Dean*, 5 Eq. 245, a gift over of a fund in case the legatee should marry or die unmarried, where the legatee was married at the date of the will and of the testator's death, but her husband was believed to be dead, was held to refer to a second marriage. See, too, *Lepine v. Bean*, 10 Eq. 160; *Smith v. Charles*, 13 W. R. 224.

Gift over upon death unmarried and without issue after a prior gift to the legatee for life, and then to his children.

5. If the gift is to A. for life, remainder to his children, and if A. dies unmarried and without issue over, unmarried will be read as equivalent to not having a wife at his death. To read it as never having been married would increase the chance of intestacy, since in that case, if A. married and had no children, the gift over would not take effect; and, again, the word, unmarried would be mere surplusage. *Doe d. Everett v. Cooke*,



7 East, 269; *In re Sanders' Trusts*, L. R. 1 Eq. 675; see *Re King*; *Salisbury v. Ridley*, 62 L. T. 789. Chap. XLI.

"AND" CHANGED INTO "OR" IN GIFTS OVER.

1. If there is a devise to A. in fee and if he dies under twenty-one and without issue over, "and" will not be read "or." To do so would have the effect of divesting a prior devise in events other than those mentioned. *Malcolm v. Malcolm*, 21 B. 225; *Coates v. Hart*, 32 B. 349; 3 D. J. & S. 504. Devise to A. in fee, and if he dies under 21 and without issue over.

And, similarly, a gift to A. for life, and then to her children, and if she dies under twenty-one and without children over, will not be construed as if it were under twenty-one or without children. *Key v. Key*, 1 Jur. N. S. 372.

2. If the devise is to A. in tail and if he dies under twenty-one and without issue over, "and" will not be read "or." *Grey v. Pearson*, 6 H. L. 61, and *Doe d. Usher v. Jessop*, 12 East, 288; overruling *Brounsword v. Edwards*, 2 Ves. Sen. 243, so far as it is an authority on this point. In this case there is reason for contending that the devise over ought to be read as equivalent to "if he dies under twenty-one or at any time without issue," since the estate would take effect as a remainder after an estate tail; but this would deprive the issue of any benefit if the devisee died under twenty-one leaving issue, unless the devise were read under twenty-one without issue, or at any time without issue, involving a very considerable alteration of the words of the will. Devise to A. in tail, and if he dies under 21 and without issue over.

This latter construction, however, would perhaps be adopted if the original devise in tail were made contingent upon the devisee attaining twenty-one or having issue. *Brounsword v. Edwards*, 2 Ves. Sen. 243.

3. A different question arises where the gift over is upon two events, one of which includes the other, as "if A. dies unmarried and without children." Gift over upon two events, one of which includes the other.

If the gift is to A. for life and then to his children absolutely, so that if A. marries but has no children there would be an intestacy, there are two possible constructions:—

a. If possible, unmarried will be held to mean unmarried at Unmarried if

**Chap. XII.** the time of death, and it is then unnecessary to change "and" into "or." *Doe d. Baldwin v. Rawding*, 2 B. & Ald. 441; *Doe d. Everett v. Cooke*, 7 East, 269; *In re Sanders' Trusts*, L. R. 1 Eq. 675; see *ante*, p. 612.

possible will mean not married at the death.

The same is the case if unmarried means "not married by consent." *Dillon v. Harris*, 4 Bl. N. S. 321.

If unmarried must mean never married "and" will be changed into "or."

*b.* If, however, it is clear that unmarried must mean never having been married, it seems doubtful whether "and" will not be changed into "or." According to the earlier cases, there is no doubt that the change would be made. *Wilson v. Bayly*, 8 B. P. C. 195; *Hepworth v. Taylor*, 1 Cox, 112; *Maberley v. Strode*, 3 Ves. 450; *Bell v. Phyn*, 7 Ves. 458; see *Long v. Lane*, 17 L. R. Ir. 11.

These cases are, however, of doubtful authority, since the term "unmarried" would probably now in all similar cases be held equivalent to "not married at the death."

The question in *Grey v. Pearson*, 6 H. L. 61, was so different that it can hardly be said to have any bearing upon this point.

Gift over after absolute interest.

If the gift is to A. absolutely, and if he dies unmarried and without issue him surviving, unmarried will be read as equivalent to without leaving a widow, and "and" will not be changed into "or." *Carolin v. Carolin*, 17 L. R. Ir. 25, n.

Gift over after an absolute interest, if the legatee dies before marriage and without issue.

And if the gift is to A. absolutely, and if he dies before marriage and without children over, "and" will not be read "or," as to do so would be to increase the defeasibility of interests already completely disposed of in all events. *Secombe v. Edwards*, 24 B. 440; *Steen v. Steen*, I. R. 6 C. L. 8.

Where land was devised to A. absolutely, with a gift over if A. died "unmarried and without legal issue," and A. was given a power to jointure a widow in a limited sum, it was held that, in order that the power might not be otiose, "unmarried" must be construed "never having been married," and "and" must be changed into "or." *Long v. Lane*, 17 L. R. Ir. 11.

"And" will not be changed into "or" where the gift over is upon death in the testator's lifetime, and before receiving any benefit. *In re Kirkbride's Trusts*, L. R. 2 Eq. 400.

4. Where the two events upon which the gift over is made to depend are independent of each other, there can be no reason for changing "and" into "or." *Day v. Day*, Kay, 708; *Reed v. Braithwaite*, 11 Eq. 514; see *Barker v. Young*, 83 B. 858.

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Gift over upon two independent events.

#### CHANGE OF "OR" INTO "AND" IN GIFTS OVER.

1. If there is a devise to A. in fee if she dies leaving lawful issue, but if she dies under age and without lawful issue over, "or" will be read "and." *Johnson v. Simcock*, 6 H. & N. 6; 9 W. R. 895.

Gift over upon death under age or without lawful issue.

2. If the devise is to A. in fee, and if he dies under twenty-one or without issue over, "or" will be read "and," to favour the issue of A. *Fairfield v. Morgan*, 2 B. & P. N. R. 38; *Denn d. Wilkins v. Kemys*, 9 East, 366; *Eastman v. Baker*, 1 Taunt. 174; *Morris v. Morris*, 17 B. 198.

And this construction has been adopted in the case of personalty where, after an absolute interest, whether contingent upon attaining twenty-one or not, the gift over was upon death under twenty-one or without issue or upon death before the age of twenty-one or day of marriage. The testator cannot have intended the property to go over if the legatee should die under twenty-one leaving issue. *Mytton v. Boodle*, 6 Sim. 457; *In re Clegg's Estate*, 14 Ir. Ch. 70; *In re Cantillon's Minors*, 16 Ir. Ch. 301; *Wright v. Marson*, W. N. 1895, 148.

3. If the devise is to A. for life, remainder to his children in tail, and if A. dies under twenty-one or without children over, it is doubtful whether "or" would be read "and." According to the earlier authorities, the change would be made. *Hasker v. Sutton*, 1 Bing. 501; 9 J. B. Moo. 2; but see *Cooke v. Mirehouse*, 34 B. 27.

4. And where, after a prior absolute gift, the gift over is upon failure of issue or some other event, such as not making a will, "or" will be read "and," though the gift over may thereby become void. *Incorporated Society v. Richards*, 1 D. & War. 258; *Greated v. Greated*, 26 B. 621; *Green v. Harvey*, 1 Ha. 428; *Stretton v. Fitzgerald*, 23 L. R. Ir. 310, 466.

Gift over upon failure of issue or some other event.

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Devise to A. in tail, and if he dies under 21 or without issue over.

5. If the devise is to A. in tail and if he dies under twenty-one or without issue over, "or" will not be construed "and;" though, on the other hand, it seems that if the devisee died under twenty-one leaving issue, the gift over would not be held to have taken effect, so that the devise would, in fact, be construed as equivalent to "if A. dies under twenty-one without issue or without issue at any time." *Mortimer v. Hartley*, 6 Ex. 47; *Soulle v. Gerard*, Cro. Eliz. 525; *Woodward v. Glasbrook*, 2 Vern. 388; and Lord St. Leonards' judgment in *Grey v. Pearson*, 6 H. L. 61. The devise over in this case takes effect as a remainder after an estate tail.

Gift over in case of death of the devisee or failure of his issue.

6. If the devise over after an estate tail to A. is in case of the death of A., or want of his issue, "or" must be read "and" in order to preserve the prior estate. *Monkhouse v. Monkhouse*, 3 Sim. 119.

"Or" read "and" in the gift over when the gift is vested in one or other of the two events.

7. "Or" will be read "and" when a gift is given upon either of two events, as upon attaining twenty-one or marriage, and there is gift over upon death under twenty-one or unmarried, the gift over being otherwise inconsistent with the prior gift. *Grant v. Dyer*, 2 Dow, 87; *Malcolm v. O'Callaghan*, Coop. t. Brougham, 73; *Thompson v. Teulon*, 22 L. J. Ch. 243; *Thackeray v. Hampson*, 2 S. & St. 214; *Grimshaw v. Pickup*, 9 Sim. 591; *Collett v. Collett*, 35 B. 312.

Gift over upon death before the tenant for life, or under 21.

8. In some cases where there has been a gift contingent upon attaining twenty-one, subject to a life interest, and a gift over upon death before the tenant for life or under twenty-one, "or" has been read "and." *Miles v. Dyer*, 5 Sim. 435; 8 Sim. 330; *Bentley v. Meech*, 25 B. 197.

And if a gift over upon death under age or without leaving a husband is afterwards referred to as "in case of death under age as aforesaid," "or" will be read "and." *Weddell v. Mundy*, 6 Ves. 341.

## GIFT OVER UPON DEATH WITHOUT CHILDREN.

"Children" read "issue" in a gift over upon death without children.

In many cases where an estate in fee is given, followed by a gift over in the event of the devisee dying without children, the word children has been construed as synonymous with issue. *Doe d. Smith v. Webber*, 1 B. & Ald. 713; *Doe d.*

*Simpson v. Simpson*, 5 Sc. 770; 4 Bing. N. C. 333; *Doe d. Blesard v. Simpson*, 3 M. & Gr. 929; *Baron v. Cosby*, 4 De G. & S. 261; *Parker v. Birks*, 1 K. & J. 156; *Richards v. Davies*, 13 C. B. N. S. 69, 861; see *Matheurs v. Gardiner*, 17 B. 254.

And the same construction would perhaps be put upon a similar gift over after an absolute bequest of personalty. *In re Synge's Trust*, 3 Ir. Ch. 379; see *Stone v. Maule*, 2 Sim. 490.

#### GIFTS OVER UPON DEATH WITHOUT LEAVING OR HAVING ISSUE.

The word leaving in a gift over upon death without leaving issue *prima facie* means leaving issue living at the death, but the word leaving will in some cases be construed as equivalent to having had so as not to destroy prior vested interests.

1. If there is a gift to A. for life with a gift after his death to his children to be paid or vested at twenty-one, or to the children without more, so that they take vested interests at birth, a gift over if A. dies without leaving children, will be construed as equivalent to without having had children or without having had children who attain vested interests, as the case may require. *Marshall v. Hill*, 2 Mau. & S. 608; *Maitland v. Chalie*, 6 Mad. 243; *Casamajor v. Strode*, 8 Jur. 14; *In re Thompson's Trusts*, 5 De G. & S. 667; *Kennedy v. Sidgwick*, 3 K. & J. 540; *White v. Hill*, 4 Eq. 265; *Treharne v. Layton*, L. R. 10 Q. B. 459; see *Ex parte Hooper*, 1 Dr. 264; *Re Bogle*; *Bogle v. Yorstoun*, 78 L. T. 457.

The same construction was adopted where the gift was to children who attain twenty-one, and the gift over was if the tenant for life should die without leaving "issue," but it must have been on the ground that issue meant such issue, i.e. children who attain twenty-one. *In re Brown's Trust*, 16 Eq. 239.

2. This construction cannot be adopted where the gift over is on the death of the tenant for life without leaving any children at his death, or without leaving any children him surviving. *Young v. Turner*, 1 B. & S. 550; *In re Hamlet*; *Stephen v. Cunningham*, 38 Ch. D. 183; 39 Ch. D. 426.

And it does not apply where the subject-matter of the gift is

Leaving  
construed as  
equivalent to  
having had.

A. for life  
then children  
gift over on  
death of A.  
without leav-  
ing children.

Death with-  
out leaving  
children  
surviving.

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Not applied  
to vest con-  
tingent  
interests.

an annuity, and the testator contemplates personal enjoyment by the legatees in remainder. *In re Hemingway*; *James v. Dawson*, 45 Ch. D. 453.

3. The Court, however, will not depart from the ordinary meaning of the word leaving, in order to vest interests which were not vested before.

When the gift is, for instance, if the tenant for life leaves children, to all such children, with a gift over in the event of his death without leaving children, the word leaving must have its ordinary meaning. In these cases the condition of surviving the tenant for life is part of the original gift, and there is no question of divesting a prior gift. *Sheffield v. Kennett*, 27 B. 207; 4 De G. & J. 593; *Bythessea v. Bythessea*, 17 Jur. 645; 23 L. J. Ch. 1004; *Young v. Turner*, 1 B. & S. 550; see *In re Watson's Trust*, 10 Eq. 36, and the comments therein upon *Bryden v. Willett*, 7 Eq. 472; *Jeyes v. Sarage*, 10 Ch. 555; and see *Hedges v. Harpur*, 3 De G. & J. 129.

Gift over after  
absolute  
interest.

4. And where there is a gift to A. absolutely and a gift over on his death without leaving children, the word "leaving" will be construed strictly. *In re Ball*; *Slattery v. Ball*, 36 Ch. D. 508; 40 Ch. D. 11, overruling *White v. Hight*, 12 Ch. D. 751; *Armstrong v. Armstrong*, 21 L. R. Ir. 115; see *Clay v. Coles*, 57 L. T. 682.

Without  
having any  
child.

5. It seems the words "without having any child" may be construed as equivalent to "without having had" any child. *Weakley d. Knight v. Rugg*, 7 T. R. 322; *Wall v. Tomlinson*, 16 Ves. 413; *Jeffreys v. Conner*, 28 B. 328.

Without any  
children.

6. But the words "without any children" mean without children at the death. *Thicknesse v. Liege*, 2 B. P. C. 365; *Jeffreys v. Conner*, *supra*; *In re Booth*; *Pickard v. Booth*, (1900) 1 Ch. 768; see *In re Hambleton*; *Hambleton v. Hambleton*, W. N. 1884, 157.

## CHAPTER XLII.

## GIFTS OVER UPON DEATH WITHOUT ISSUE.

WHEN there is a gift over upon the death of A. without issue before a given time the gift over takes effect upon the failure of issue of A., not necessarily at his death, but at any time during the given period, whether the will is before or since the Wills Act. *Crowder v. Stone*, 3 Russ. 217; *Jarman v. Vye*, L. R. 2 Eq. 784.

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Gift over  
upon death  
of the devisee  
without issue  
before a given  
time.

It is not quite clear whether a devise upon failure of issue to such of certain named legatees as should be "then living," which would in a will before the Act have been held to take effect upon failure of issue of the ancestor at his death, or at any time during the lives of the surviving legatees, would now be held to take effect only upon failure of issue of the ancestor at his death. See *Murray v. Addenbrook*, 4 Russ. 407; *Greenwood v. Verdon*, 1 K. & J. 74.

Gift over  
upon death  
without issue  
to persons  
then living.

By sect. 29 of the Wills Act, words "which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or

Effect of the  
29th sect. of  
the Wills Act  
upon gifts in  
default of  
issue.

Chap. XLII. — otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue." See *In re Chinnery's Estate*, 1 L. R. Ir. 296.

Death with-  
out issue  
male.

The words dying without male issue will, under this section, be restricted to male issue living at the death of the ancestor. *Upton v. Hardman*, 1 R. 9 Eq. 157; *In re Edwards; Edwards v. Edwards*, (1894) 3 Ch. 644.

This section does not apply:—

In what cases  
the section  
does not  
apply.

1. Where the words used are heirs of the body and not issue. *Harris v. Davis*, 1 Coll. 416; *Re Sallery*, 11 Ir. Ch. 286; *Dawson v. Small*, 9 Ch. 651.

2. Where the failure of issue would not before the Act have been construed to import an indefinite failure of issue. *Morris v. Morris*, 17 B. 198.

3. Apparently it would not apply where there is a gift of personalty to A. and the heirs of his body, followed by a gift over in default of his issue. At any rate, it does not where realty and personalty are given together in tail. *Green v. Green*, 3 De G. & S. 480; see *Greenway v. Greenway*, 2 D. F. & J. 137; *Green v. Giles*, 5 Ir. Ch. 25.

#### REFERENTIAL CONSTRUCTION OF GIFTS OVER UPON DEATH WITHOUT ISSUE.

The construction of gifts over in default of issue is not affected by the Wills Act, where those words are construed to mean default of issue to take under the preceding limitations. It becomes necessary, therefore, to consider in what cases the referential construction has been adopted.

A. Where the words are for default of *such* issue, they naturally refer to the issue before mentioned.

Gift over in  
default of  
*such* issue,  
after limita-  
tions in tail.  
After limita-  
tions in fee.

1. This is clearly the case where the prior limitations are in tail. *Doe d. Phipps v. Lord Mulgrave*, 5 T. R. 820.

2. So where the prior limitations are to children and their heirs, a gift over in default of such issue means in default of such children. *Doe d. Comberbach v. Perryn*, 3 T. R. 484; *Rex v. Marquess of Stafford*, 7 East, 521.

But if there is anything to show that the children were intended to take estates tail, the words in default of such issue



may be referred to the word heirs so as to cut down the estates to estates tail. Thus, where the limitation was to the first and other sons and their heirs, a gift over in default of such issue was referred to the word heirs, the intention being that the sons were to take in succession. *Lewis d. Ormond v. Waters*, 6 East, 336. Chap. XLII.

In *Biddulph v. Lees*, E. B. & E. 289, the intention to give estates tail was apparent from the shifting clause.

3. And even though the limitation be to children simply, so that they would only take for life, a gift over in default of such issue will be construed referentially. *Hay v. Earl of Coventry*, 3 T. R. 83 ; *Denn d. Breddon v. Page*, 3 T. R. 87, n. ; 11 East, 608, n. ; *Ashley v. Ashley*, 6 Sim. 358 ; *Bridger v. Ramsay*, 10 Ha. 320 ; *Re Arnold's Estate*, 33 B. 163. After limitations for life.

4. On the other hand, where there is a limitation to a first son without more, followed by limitations in default of such issue to the other sons in tail, the Court will lay hold of small circumstances to give the first son also an estate tail. After limitations giving a first son a life interest only and the other sons estates tail.

Thus, in *Erans d. Brooke v. Astley*, 3 Burr. 1569, there was the circumstance that the testator referred to the earlier limitations as including the "parent and his descendants."

In *Clements v. Paske*, 3 Doug. 314, the limitation to the first son was referred by the word "likewise" to other limitations in fee.

And see *Doe d. Harris v. Taylor*, 10 Q. B. 718, which may perhaps be supported on the ground that the words "the elder of such sons and the heirs of his body to take before the younger," applied to the first son as well as to the others. See, however, *Barnacle v. Nightingale*, 14 Sim. 456 ; and see *Galley v. Barrington*, 2 Bing. 387 ; *In re Denny's Estate*, 1 R. 8 Eq. 427.

5. The *primâ facie* meaning of the word "such" is to refer the word with which it is coupled to earlier words, so that the latter word is only a compendious statement of the earlier limitations ; it may, however, have the converse effect if there is anything upon the will to show that the testator used the earlier word in the sense of the latter ; and the word "such" may be rejected, if the term with which it is coupled and that Inaccurate use of the word "such."

Chap. XLII. to which it refers are so inconsistent with each other that the testator cannot have meant the one as a mere compendious reference to the other.

Thus, a devise to A. and his heirs, and in default of such issue over would, perhaps, in a will cut down A.'s estate to an estate tail. See *Idle v. Cook*, 1 P. W. 70.

And in *Parker v. Tootal*, 11 H. L. 143, where the devise was to Thomas for life, remainder to the first son of the said Thomas in tail male lawfully begotten, severally and successively; and for want of such lawful issue either of Thomas or of James, over, the word such was practically rejected and Thomas took an estate tail in remainder after the estate tail of his first son. See also *Chorlton v. Craven*, 3 D. & Ry. 808; 2 B. & C. 524.

Gift over in  
default of  
issue simply.

B. When there is a devise to A. for life, followed by particular limitations in favour of some of his issue, with an ultimate limitation on failure of the issue of A., the question arises whether the intention was to benefit all the issue, notwithstanding the incomplete enumeration of them under the special limitation, in which case, in wills before the Wills Act, the gift over in default of issue will give A. an estate tail, or whether the issue intended to be benefited are sufficiently indicated by the special limitations, in which case the failure of issue will be construed to mean such issue as before mentioned.

When the  
prior limita-  
tions are to  
the ancestor  
for life with  
remainder to  
his children  
in fee or in  
tail.

1. If the devise is to A. for life, then to his children, so that they take vested estates in fee or tail, and in default of issue of A. over, issue means the issue before mentioned, and A.'s estate will not be enlarged. *Foster v. Hayes*, 2 E. & B. 27; 4 E. & B. 717; *Towns v. Wentworth*, 11 Moo. P. C. 526; *Smyth v. Power*, 1. R. 10 Eq. 192; see *Bowen v. Lewis*, 9 App. C. 890.

When the  
prior limita-  
tions include  
sons only.

And this is the case, though the children included under the prior limitations may be sons only and not daughters, and though the prior estates may be in tail male. *Turke v. Frenchman*, 2 Dyer, 171; 1 And. 8; *Baker v. Tucker*, 11 Ir. Eq. 104; 3 H. L. 106; *Grattan v. Langdale*, 11 L. R. Ir. 473.

*Quere*, whether it makes any difference in the construction

of the gift over in default of issue that the ancestor has children living at the date of the devise. See *Doe d. Todd v. Tuesbury*, 8 M. & W. 514, commented on in 4 E. & B. 780. Chap. XLII.

2. If, however, the prior limitations include less than the whole number of sons the referential construction will not be adopted. *Langley v. Baldwin*, 1 Eq. Ab. 185, pl. 29, cit. 1 P. W. 759; *A.-G. v. Sutton*, 1 P. W. 753; 3 B. P. C. 75; *Stanley v. Lennard*, Amb. 355; 1 Ed. 87; *Key v. Key*, 4 D. M. & G. 78. Where the prior limitations include less than the whole number of sons.

The referential construction is, however, more readily adopted where the limitations are to some of the issue at twenty-one, and there is a gift over in default of issue who attain twenty-one. *Sanders v. Ashford*, 28 B. 609.

3. If the failure of issue is restricted to failure at the death of the parent the referential construction will not be adopted, as it might have the effect of divesting the interests of children who had died before the tenant for life leaving children. *Westwood v. Southey*, 2 Sim. N. S. 192; *Ex parte Hooper*, 1 Dr. 264; *Re Tookey's Trust*, 21 L. J. Ch. 402; *In re Biron*, 1 L. R. Ir. 258. When the failure of issue is restricted to such failure at the ancestor's death.

4. If the gift is to A. for life, then to such issue as he should appoint by will and if A. dies without issue over, issue in the gift over is held to refer to the issue before-mentioned, that is to say, issue living at the death of A. *Target v. Gaunt*, 1 P. W. 432; *Hockley v. Mawbey*, 1 Ves. Jun. 143; 3 B. C. C. 82; *Leeming v. Sherratt*, 2 Ha. 14; *Hanan v. Drew*, 10 Ir. Eq. 333; *Eastwood v. Arison*, L. R. 4 Ex. 141. Gift over in default of issue after a power to appoint to issue by will.

5. When the limitations to issue are contingent upon attaining a certain age, it seems the referential construction would not be adopted. *Doe d. Rew v. Lucraft*, 1 M. & Sc 573; 8 Bing. 386; *Franks v. Price*, 6 Sc. 710; 5 Bing. N. C. 37; 3 B. 182. Where the limitations to issue are contingent.

6. In wills before the Wills Act, where the devise to children is without words of limitation so that they only take estates for life, the referential construction will not be adopted, but the parent will take an estate tail in remainder after the life estates. *Parr v. Swindells*, 4 Russ. 283. *Bennett v. Lowe*, 5 M. & Pay. 485; 7 Bing. 535, is not inconsistent with this Where the children take for life only in wills before the Wills Act.

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rule, since the gift over was not upon an indefinite failure of issue; and *Wight v. Leigh*, 15 Ves. 564, which conflicts with the latter branch of this rule, would probably not now be followed.

C. Similar rules apply to personalty.

Referential construction of gifts over upon death without issue in the case of personalty.

1. Thus, in a bequest to A. for life and then to his children and if A. dies without issue over, the gift over refers to the failure of the objects of the prior gift. *Doe d. Lytle v. Lytle*, 1 T. R. 598; *Salkeld v. Vernon*, 1 Ed. 64; *Bryan v. Mansion*, 5 De G. & S. 737; *Robinson v. Hunt*, 4 B. 450; *In re Wyndham's Trusts*, L. R. 1 Eq. 290; *In re Sanders' Trusts*, *ib.* 675.

"If there be no child there can be no other issue, and if there be a child, the child will take the whole, and there will be nothing to limit over." Per Turner, L.J., *Pride v. Fooks*, 3 De G. & J. 252.

Where family plate was settled on A. for life, with remainder to B. his first son for life, with remainder to B.'s first son absolutely, and in the event of B.'s first son dying under twenty-one and without issue to the second and other sons of B. in the same way, and in default of sons of B. similar limitations in favour of the second and other sons of A. absolutely, with an ultimate limitation if there should be no son of A. or B. who should attain twenty-one or die under that age leaving issue, the ultimate gift over took effect, though B. attained twenty-one. *Cardigan v. Curzon Howe*, 9 Eq. 358.

Where the prior gifts to issue are contingent.

2. Where the prior gifts to the children are not vested so that there may be issue who may not take under them, for instance, children of children who die before the time of vesting, it is less easy to admit the referential construction, and it seems that without some further indications to be collected from the will it will not be adopted. *Pride v. Fooks*, 3 De G. & J. 252; *Walker v. Mower*, 16 B. 365.

And the same is the case where the gifts to the children are only to arise upon a contingency, as for instance, if the legatee marries. *Andree v. Ward*, 1 Russ. 260; *Campbell v. Harding*, 2 R. & M. 390; 2 Cl. & Fin. 431; 8 Bl. N. S. 469.

Under a gift to a tenant for life and then to such children

as she should leave at her decease, with a power of appointment to the tenant for life in the event of her death without issue, the referential construction was adopted. *In re Merceron's Trusts*; *Davies v. Merceron*, 4 Ch. D. 182; see *Hutchinson v. Tottenham*, (1898) 1 Ir. 403; (1899) 1 Ir. 344.

3. The referential construction may be assisted by other limitations. See *Malcolm v. Taylor*, 2 R. & M. 416, where this construction was assisted by the devise of the realty.

Referential construction assisted by other limitations.

4. And when there is elaborate provision made for the issue of children dying before the time of vesting and born within the limits of perpetuity, a gift over in default of issue may very well be referred to the prior limitations. *Ellicombe v. Gompertz*, 3 M. & Cr. 127; *Trickey v. Trickey*, 3 M. & K. 560.

When the issue of parents dying before the time of vesting are provided for.

5. The referential construction will not be adopted where the bequest is in joint tenancy to A. and her children, with a gift over in default of issue. In this case the whole is already disposed of, whether children are born or not, and in the absence of some further indication of intention there can be no reason for attempting to make the gift over valid in order to divest absolute interests. *Fisher v. Webster*, 14 Eq. 283.

Bequest in joint tenancy to a parent and children, followed by a gift over on death without issue.

#### DEATH WITHOUT ISSUE BEFORE THE WILLS ACT.

Such words as "dying without issue," or "without leaving," or "having issue" in devises before the Wills Act, were construed to mean an indefinite failure of issue. *Lee's Case*, 1 Leon. 285, pl. 387; *Cole v. Goble*, 13 C. B. 445.

But with regard to personalty, death without *leaving* issue was held to mean leaving issue at the death. And where real and personal estate were devised by the same words, death without leaving issue imported an indefinite failure of issue as regards the realty, but a failure of issue at the death as regards the personalty. *Forth v. Chapman*, 1 P. W. 663; *Bamford v. Chadwick*, 2 W. R. 530.

Cases before the Wills Act in which gifts over on failure of issue will not import an indefinite failure.

Many cases are reported in the books in which the question was whether failure of issue could by construction be limited to failure at the death of the ancestor. But as the law has been altered by the Wills Act, these cases are omitted as obsolete.

## CHAPTER XLIII.

## SHIFTING CLAUSES.

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WHERE estates are given by will, and there is a clause shifting the lands if the devisee comes into possession of estates previously settled, the estates go over if the event happens. *Cope v. Earl de la Warr*, 8 Ch. 982.

Life estate coming into possession in event upon which the shifting clause is to take effect.

And the shifting clause will operate upon the life interest of a tenant for life, though his interest is such, that if he comes into possession of the settled estates, his life interest under the will must at the same time come into possession; so that, in effect, the gift of the life interest is nugatory. *Lambarde v. Peach*, 4 Dr. 553; on app. sub. nom. *Turton v. Lambarde*, 1 D. F. & J. 495.

Possession of settled estates *prima facie* refers to possession under the settlement.

When estates devised by will are directed to shift on the devisee coming into possession of settled estates, the presumption is that the testator means a possession under the settlement; and, therefore, if the devisee comes into possession of the settled estates not under the settlement, but under an entirely new title, for instance, under the will of a tenant in tail, who had barred the entail, the shifting clause will not take effect. *Taylor v. Earl of Harewood*, 3 Ha. 372; *Wandesforde v. Carrick*, 1 R. 5 Eq. 486.

*À fortiori*, where the shifting clause is to take effect on the devisee becoming entitled to other estates under any existing or future will or settlement and he becomes entitled by descent from his father, though the latter took under a will, the devised estates will not shift. *Walmesley v. Gerard*, 29 B. 321.

Meaning of "entitled."

The term entitled would in such a clause mean entitled in possession. *Umbers v. Jaggard*, 9 Eq. 200; see *Gryll's Trusts*, 6 Eq. 589; *In re Finch*; *Abbiss v. Burney*, 17 Ch. D. 223.

A person may be entitled in possession within the meaning of a name and arms clause, though the testator's widow may be entitled to occupy the mansion-house rent free and though the charges may swallow up all the rents and profits. *Re Varley*; *Thornton v. Varley*, 68 L. T. 665.

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Possession  
need not be  
beneficial.

A shifting clause which affects "any person for the time being entitled to the possession or to the receipt of the rents and profits" of devised hereditaments does not apply to an infant, where by a clause in the will possession is given to trustees during his minority. *Leslie v. Earl of Rothes*, (1894) 2 Ch. 499.

If the devisee takes the settled estates not under the settlement existing at the date of the will, but under a resettlement, which can be looked upon as a continuation of the old title, the devisee taking the same interest under the resettlement as he would have taken under the old settlement, except so far as his interest has been diminished for his own benefit, the shifting clause takes effect. *Harrison v. Round*, 2 D. M. & G. 190; see *In re Croker's Estate*, 1 R. 2 Eq. 58; *Wright v. Marshall*, 51 L. T. 781.

Whether a  
devisee taking  
settled estates  
under a  
resettlement  
is within a  
shifting  
clause.

If the devisee takes under the resettlement a diminished interest in the settled estates or the estates themselves are diminished in quantity, the shifting clause has no effect. *Fazakerley v. Ford*, 4 Sim. 390; 1 A. & E. 897; *Gardiner v. Jellicoe*, 12 C. B. N. S. 568; *Meyrick v. Laurs*, 9 Ch. 237.

On the other hand, if the testator expressly gives directions to have a portion of the settled estates settled to other uses, the devolution of the settled estates to the devisee diminished by that portion will not prevent the operation of the shifting clause. *Micklethwait v. Micklethwait*, 4 C. B. N. S. 790; see *Stacpoole v. Stacpoole*, 2 Con. & Law. 489, 501.

The shifting clause will not, in the absence of a clear intention, take effect where the devisee has only an interest in remainder in the settled estates. *Monypenny v. Dering*, 2 D. M. & G. 145; *Curzon v. Curzon*, 1 Giff. 248; *Bagot v. Legge*, 34 L. J. Ch. 156; 12 W. R. 1097.

Operation of  
a shifting  
clause where  
a devisee has  
only remain-  
der in settled  
estates.

As to the repeated operation of a shifting clause, see *Doe d. Lumley v. Earl of Scarborough*, 3 A. & E. 2, 897; *Monypenny v. Dering*, 2 D. M. & G. 145.

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It seems a shifting clause would not avoid jointures and portions properly charged upon the estates previous to their shifting. *Holmesdale v. West*, 12 Eq. 280.

In what case estates directed to shift to the next remainderman will go to the trustees to preserve.

Where an estate devised by will is directed upon the devolution of settled estates to the devisee to go over to the next remainderman, as if the tenant for life were dead, the estate will shift to trustees to preserve contingent remainders where there are contingent remainders to unborn sons of the tenant for life whose life estate has ceased; though, strictly speaking, if the tenant for life were dead, the estate of the trustees to preserve would also be at an end. *Doe v. Heneage*, 4 T. R. 13; see the opinion of Fearne, C. R., App. No. 6; *Stanley v. Stanley*, 16 Ves. 491; *Morrice v. Langham*, 11 Sim. 260; 12 Sim. 615; and see 11 Cl. & F. 667; *Lambarde v. Peach*, 4 Dr. 553; on app. sub. nom. *Turton v. Lambarde*, 1 D. F. & J. 495; see *Lord Kenlis v. Earl of Bective*, 34 B. 587.

Who is entitled to the intermediate rents.

As to whether the heir or remainderman is entitled to the rents during the period between the shifting of the estate to the trustees and the birth of issue to take, it seems that a direction that the rents may be applied for the maintenance of a remainderman, even during the lifetime of a tenant for life, would be sufficient to show that the rents were not to go to the heir. *Turton v. Lambarde*, 1 D. F. & J. 495 (judgment of Turner, L.J.); *D'Eyncourt v. Gregory*, 34 B. 36.

On the other hand, in the absence of some such intention, they would go to the heir. *Stanley v. Stanley*, 16 Ves. 491; and see per Kindersley, V.-C., *Lambarde v. Peach*, 4 Dr. 553.

Estate directed to shift as if the devisee were dead without issue.

When the devised estate is directed to go over, as if the person becoming entitled to the settled estates were dead without issue, the next remainderman takes on the event happening. *Morrice v. Langham*, 8 M. & W. 194.

In such case trustees to preserve will not take.

And in such a case, if the next limitations in remainder are contingent, the estates will not go to trustees to preserve contingent remainders during the life of the person from whom the estate is shifted, since their estate would in any event be inadequate to support contingent remainders limited upon a failure of issue of such person after his death. *Carr v. Earl of Errol*, 6 East, 58.



When the devised estates are directed to go to the next remainderman, as if the person taking the benefit upon the accruer of which the estate is to shift were dead without issue, the construction will not be influenced by the fact that the younger children of the person from whom the estates shift may happen to take no benefit under the settlement. *Doe d. Lumley v. Earl of Scarborough*, 3 Ad. & E. 1. Chap. XLIII.

But where estates were devised to several sons successively in tail male, with remainder to the children of the sons in tail general, with remainder over, and the estates were directed to go over upon the acquisition of settled estates (which could not go to any female issue of the testator's sons), as if the person taking the settled estates were dead without issue, the words "without issue" were confined to issue capable of taking under the limitations of the devised estate preceding the next remainder. *Gardiner v. Jellicoe*, 12 C. B. N. S. 568; 11 H. L. 323.

Issue limited to issue capable of taking under the limitation of the devised estate preceding the next remainder.

## CHAPTER XLIV.

## GIFTS BY REFERENCE.

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Chattels given  
to a person to  
go as heir-  
looms.

A BEQUEST of chattels to a person and his heirs or successors to go according to the limitations of real estate or as heirlooms vests absolutely in the person named, whether such words as "so far as the rules of law and equity permit," or "to be enjoyed and go with the title," are added or not. The Court, in fact, refuses to treat such a bequest as executory. *Rowland v. Morgan*, 6 Ha. 468; 2 Ph. 764; *In re Johnston*; *Cockerell v. Earl of Essex*, 26 Ch. D. 538.

The cases of *Gower v. Grosvenor*, Barn. 54; 5 Mad. 337, and *Trafford v. Trafford*, 3 Atk. 347, so far as they express a contrary opinion, are overruled.

Chattels to go  
with a title.

In the same way, a gift of chattels to such persons as should from time to time be the holders of a title, so far as the rules of law permit, vests absolutely in the first holder of the title after the testator's death, though he may have been born at the testator's death, and could, therefore, have been cut down to a life interest. *Tollemache v. Corentry*, 2 Cl. & F. 611; 8 Bl. N. S. 547; *In re Viscount Exmouth*; *Exmouth v. Praed*, 23 Ch. D. 158.

Chattels to go  
as heirlooms  
with realty.

A gift of personalty as heirlooms to the persons for the time being entitled to real estate, so far as the rules of law and equity permit, vests absolutely not in a tenant for life of the real estate, but in the first tenant in tail at birth, whether he comes into possession or not. *Trafford v. Trafford*, 3 Atk. 347; *Vaughan v. Burslem*, 3 B. C. C. 101; *Foley v. Burnell*, 1 B. C. C. 274; 4 B. P. C. 319; *Carr v. Lord Errol*, 14 Ves. 478; *Lord Scarsdale v. Curzon*, 1 J. & H. 40; *In*

*re Johnson's Trust*, L. R. 2 Eq. 716; see *Miller v. Stanley*, Chap. XLIV. 12 W. R. 780.

But the chattels will not vest in a tenant in tail whose estate is liable to be divested by the birth of issue to take under prior limitations and who dies before his estate becomes indefeasibly vested. *Hogg v. Jones*, 32 B. 45.

A direction that the personalty is not to vest in a tenant in tail dying under twenty-one will be construed as referring to a tenant in tail by purchase under the will, and will prevent the personalty from vesting in a tenant in tail by purchase dying an infant. *Christie v. Gosling*, L. R. 1 H. L. 279; *Harrington v. Harrington*, L. R. 5 H. L. 87.

Direction against vesting under 21.

If the direction is that a tenant in tail in possession who dies under twenty-one shall not be entitled to the personalty, but that the personalty shall belong only to such person as shall first attain twenty-one and become entitled to an estate tail in possession in the real estate, the words "in possession" will not be strictly construed; but if a first tenant in tail in remainder dies under twenty-one, the personalty will vest in the next tenant in tail in remainder who attains twenty-one. *Foley v. Burnell*, 1 B. C. C. 274; 4 B. P. C. 319; *Martelli v. Holloway*, L. R. 5 H. L. 532.

Direction as to possession.

If the gift of the chattels is to the person actually seised at the death of tenants for life, or to the person seised of the actual freehold which is defined as freehold in possession, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded. *Potts v. Potts*, 3 J. & Lat. 353; 9 Ir. E. 577; 1 H. L. 671; *Lord Scarsdale v. Curzon*, 1 J. & H. 40; *In re Angerstein*; *Angerstein v. Angerstein*, 44 W. R. 152; see *Cox v. Sutton*, 25 L. J. Ch. 845.

Reference to actual possession.

In such a case, if the tenant for life and the first tenant in tail bar the entail, but the first tenant in tail dies before the tenant for life, the chattels go to the person who would have come into possession if the estate tail had not been barred. *Hogg v. Jones*, 32 B. 45.

Where chattels were settled to go along with real estate, and the testator directed that in a certain event the personal estate

**Chap. XLIV.** should go over as if the tenant in tail were dead without issue, it was held that the condition of defeasance applied to a tenant in tail who had barred the entail. *In re Cornwallis; Cornwallis v. Wykeham-Martin*, 32 Ch. D. 388.

Proviso  
divesting  
estate must  
not be  
uncertain.

A declaration that no person in existence at the testator's death or born in due time afterwards should have more than a life interest in the chattels, and so that no person should acquire an absolute interest till the expiration of twenty-one years after the decease of all persons in existence at the testator's death and afterwards attaining the title, was held to be void for uncertainty. *In re Viscount Exmouth; Exmouth v. Praed*, 23 Ch. D. 158.

Where chattels are given to the person or persons in actual possession of land, to go as far as the rules of law and equity permit, but so as not to vest in any person becoming entitled to an estate of inheritance who dies under twenty-one, and the first tenant in tail in possession dies under twenty-one, it seems doubtful whether the chattels are carried on to the next owner within the limits of perpetuity, or whether there would be a lapse. See the opinion of Lord Cairns in favour of an intestacy, and of Lord Westbury in favour of the transmission of the property within the limits of perpetuity, in *Harrington v. Harrington*, L. R. 3 Ch. 564; *ib.* 5 H. L. 87.

Possession  
under a deed  
not executed.

A gift of chattels to the person entitled under a deed of entail to the possession of a house where the deed referred to had never been executed was held to pass to the person in fact in possession of the house. *In re Marquess of Bute; Marquess of Bute v. Ryder*, 27 Ch. D. 197.

Bequests "in  
the same  
manner" as  
prior bequests.

When a bequest has been made to several persons as tenants in common for life with remainder to their children and there is a subsequent gift to the same persons *in the same manner* as the prior bequest, the second bequest will be subject to the same limitations for life and remainders over. *Milsom v. Awdry*, 5 Ves. 465; *Eames v. Anstee*, 33 B. 264; *Smith v. Greenhill*, 14 W. R. 912; *Giles v. Melsom*, L. R. 6 H. L. 24.

In *Sweeting v. Prideaux*, 2 Ch. D. 418, a subsequent gift for the life of the legatee only "in the same manner in every

respect and subject to the same control" as the prior gift, was held on the language of the will to import the limitation in remainder of the prior gift to the children of the legatee. See *Auldjo v. Wallace*, 31 B. 193; *Re Smith*; *Bashford v. Chaplin*, 45 L. T. 247. Chap. XLIV.

If, however, the original gift is directed to fall into the residue in default of children and the residue is then given to the same persons "in the same manner," these words will be referred, if possible, to a tenancy in common or separate use. *Shanley v. Baker*, 4 Ves. 781.

And where the original gifts are absolute, subject to executory gifts over, a subsequent gift to be held "in the same manner" as the prior gift will not import the executory gifts over if the words can be referred to a tenancy in common. *Launley v. Robbins*, 13 Ha. 621; and see *Hare v. Hare*, 24 W. R. 575.

A gift to A., subject to the conditions in the will named, includes conditions comprised in a codicil. *Stretton v. Fitzgerald*, 23 L. R. Ir. 310, 466.

The referential words may, however, be strong enough to import all the limitations and restrictions of the preceding gift. *Ross v. Ross*, 2 Coll. 269; *Re Colshead*, 2 De G. & J. 690; *Re Shirley's Trusts*, 32 B. 394; *Ord v. Ord*, L. R. 2 Eq. 393; *Re Lando*; *Askin v. Ferguson*, 59 L. T. 462. Gift by reference may import all the limitations of a prior gift.

When there is a gift to a class of persons living at a particular time, and a subsequent gift to the same class without the restriction of being alive at the particular time "in the same manner" as the prior gift, this will not cut down the class to take the second gift. *Yardley v. Yardley*, 26 B. 38; *Pigott v. Wilder*, 26 B. 90; *Re Wilder's Trusts*, 27 B. 418.

But there may be words which will have this effect. *Swift v. Swift*, 11 W. R. 334; 32 L. J. Ch. 479.

A specific devise of land to the uses of a settlement which contains an ultimate limitation to the testator and his heirs will not, if the ultimate limitation takes effect, pass the land to the heir. *Jacob v. Jacob*, 78 L. T. 451, 825; see 82 L. T. 270. Devise to uses of settlement

Where personalty was directed to be laid out in land to be settled to such of the uses and subject to such of the powers by a settlement limited and declared as should be subsisting at the

**Chap. XLIV.** testator's death, it was held that the purchased realty would not be subject to charges for jointures and portions actually created at the death under the powers in the settlement. *Re Berners; Berners v. Calvert*, 67 L. T. 849; 41 W. R. 188; 3 R. 158.

Reduplication  
of charges.

When property is given upon the same trusts as other property which is subject to a power to raise a definite sum, the property so given by reference is not subject to an additional charge of the same amount. *Hindle v. Taylor*, 5 D. M. & G. 577, 599; *Boyd v. Boyd*, 9 L. T. N. S. 166; 2 N. R. 486; *Baskett v. Lodge*, 23 B. 138; *Trew v. Perpetual Trustee Company*, (1895) A. C. 264; see *Sambourne v. Barry*, 1 R. 11 Eq. 140.

But if the power is to raise a charge not exceeding a certain proportion of the value of the property, the power to charge is increased in proportion by the value of the added property. *Cooper v. Macdonald*, 16 Eq. 258.

Gift to persons  
"before  
named."

It may be noticed that a bequest to persons "before named" may refer to persons before mentioned, and will not without more be confined to persons expressly mentioned by name. *In re Holmes*, 1 Dr. 321; *Bromley v. Wright*, 7 Ha. 334; *Seale-Hayne v. Jodrell*, (1891) A. C. 304.

A gift "amongst my relations hereafter named" where none are subsequently named is void for uncertainty. *Crampton v. Wise*, 58 L. T. 718.

## CHAPTER XLV.

## EXECUTORY TRUSTS.

EVERY trust which requires a future conveyance or settlement is so far executory; but the mere fact that the testator contemplates a future settlement will not justify the Court in putting upon the words of a testator any other than their legal meaning.

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Executory trusts defined.

When the testator, though contemplating the execution of a future instrument, declares the trusts upon which the property is to be held by reference to another instrument, those trusts are looked upon as incorporated into the will and must have their ordinary legal meaning. *Christie v. Gosling*, L. R. 1 H. L. 279; see *Viscount Holmesdale v. West*, L. R. 3 Eq. 474.

If the testator himself declares the trusts to be inserted in the contemplated settlement, the question then is "whether he has been his own conveyancer," in which case the trusts declared by him must be literally followed, or whether the trusts declared by him are merely the headings of a future settlement, in which case they will be so carried out as to effectuate his intention. See *Egerton v. Earl Brownlow*, 4 H. L. 1, 210; *Austen v. Taylor*, 1 Ed. 361; Amb. 376; *Boswell v. Dillon*, Dru. t. Sug. 291; *In re Nelley's Trusts*, 26 W. R. 88; *In re Parrott*; *Walter v. Parrott*, 33 Ch. D. 274.

Thus, a direction to purchase lands to be held on the trusts declared with respect to other lands must be obeyed by literally adopting those trusts. *Austen v. Taylor*, 1 Ed. 361; Amb. 376.

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Distinction  
between  
marriage  
articles and  
wills.

In marriage articles the purpose of the instrument is itself sufficient to indicate the settlor's intention that the property is to go in strict settlement, but in a will an intention that words are not to have their strict meaning must appear from the instrument itself. Therefore, though the trust is executory, a direction to settle property on A. and the heirs of his body: *Scale v. Scale*, 1 P. W. 291; *Samuel v. Samuel*, 14 L. J. Ch. 222; 9 Jur. 222; or a devise in trust for A., with a direction to make a proper entail to the male heir by him, will not cut down A. to less than an estate tail. *Blackburn v. Stables*, 2 V. & B. 367; *Sweetapple v. Bindon*, 2 Vern. 536; *Harrison v. Naylor*, 2 Cox, 247; *Randall v. Daniell*, 24 B. 193; *Marshall v. Bonsfield*, 2 Mad. 166; and see *Jerroise v. Duke of Northumberland*, 1 J. & W. 599; *Lowry v. Lowry*, 13 L. R. Ir. 317.

How far the  
rule in  
*Shelley's*  
*Case* applies  
to executory  
trusts.

If, however, an intention is manifested not to use words in their strict legal sense, the trust will be executed so as to effect the general intention.

Such an intention is sufficiently indicated if the limitation is to A. for life, remainder to his heirs: *Meure v. Meure*, 2 Atk. 165; *Papillon v. Voice*, 2 P. W. 471; *Stonor v. Curicen*, 5 Sim. 264; *Hadwen v. Hadwen*, 23 B. 551; *Bastard v. Proby*, 2 Cox, 6; *Rochfort v. Fitzmaurice*, 2 D. & War. 1; *Trevor v. Trevor*, 1 H. L. 239; by a direction that the first taker should be unimpeachable for waste: *Papillon v. Voice*, 2 P. W. 471; *Fearne*, C. R. 115; by a direction that he shall not have power to bar the entail: *Leonard v. Earl of Sussex*, 2 Vern. 526; *Fearne*, C. R. 115; or that the property shall go over if the first taker dies without issue: *Shelton v. Watson*, 16 Sim. 543; *Thompson v. Fisher*, 10 Eq. 207; by the insertion of a general limitation to preserve contingent remainders not limited to a life: *Venables v. Morris*, 7 T. R. 342, 438; *Doe d. Compere v. Hicks*, 7 T. R. 433; by a direction that a settlement shall be made as counsel shall advise and that issue are to take in succession, and according to priority. *White v. Carter*, 2 Ed. 366.

And the same result, it seems, will follow if the general scope of the limitations shows that they were not to be literally adhered to. *Parker v. Bolton*, 5 L. J. Ch. 98; *Duncan v. Bluett*, 1. R. 4 Eq. 469.



As to the effect of a direction to make a strict entail, see *Graves v. Hicks*, 11 Sim. 586; *Sealey v. Stawell*, 1 R. 2 Eq. 926.

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Direction to make a strict entail.

An executory trust to settle property upon such trusts as would correspond with the limitations of a barony granted by letters patent to several persons in succession and the heirs male of their bodies respectively, will be limited so as to give them only estates for life, the title being inalienable. *Sackville-West v. Viscount Holmesdale*, L. R. 3 Eq. 474; *ib.* 4 H. L. 543; *Lord Dorchester v. Earl of Effingham*, Sir. G. Coop. 319; 10 Sim. 587, n.; 3 B. 180, n.; *Woolmore v. Burrows*, 1 Sim. 512; *Bankes v. Baroness Le Despencer*, 10 Sim. 576.

Direction to settle property to go with a title.

It is clear that where chattels are directed to go as heirlooms with real estate "as far as the rules of law and equity permit," these words will not make the trust executory, or enable the Court to mould the limitations of the personalty. *Christie v. Gosling*, L. R. 1 H. L. 279; *In re Johnston*; *Cockerell v. Earl of Essex*, 26 Ch. D. 588.

The words "as far as the rules of law permit" will not make a trust executory.

But if such a trust is executory the Court will mould it so as to prevent the absolute vesting of chattels in a tenant in tail dying before coming into possession. See *Lady Lincoln v. Duke of Newcastle*, 12 Ves. 226, and see per Lord Chelmsford in *Christie v. Gosling*, L. R. 1 H. L. 290; *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543; see *Montagu v. Lord Inchiquin*, 23 W. R. 592.

Effect of such words where the trust is executory.

If there are shifting clauses as to the realty which would be void for remoteness as to the personalty, they will be moulded so as to carry out the intention. *Miles v. Harford*, 12 Ch. D. 691.

The Court will carry out in strict settlement an executory trust of family jewels directed to go as heirlooms to a succession of eldest sons "as far as the rules of law and equity will permit," though unconnected with limitations of real estate, and will insert provisoes against vesting in any person who does not become entitled to possession and attain twenty-one. *Shelley v. Shelley*, 6 Eq. 540.

A simple direction to settle property on beneficiaries when they come of age, without reference to marriage, probably imports no more than a trust for the beneficiaries, and they

Simple direction to settle on A.

**Chap. XLV.** may receive the property; and the same construction has been adopted where the direction was that the shares of daughters were to be settled on themselves at their marriage. *Laing v. Laing*, 10 Sim. 315; *Kennerley v. Kennerley*, 10 Ha. 160; *Munt v. Glynes*, 41 L. J. Ch. 639; *Magrath v. Morehead*, 12 Eq. 491.

If an absolute interest is given at twenty-one or marriage, with a direction that in case of marriage the share should be so settled that the legatee may enjoy the income for life for her separate use, the fund will be settled for life with restraint on anticipation, but subject thereto will belong to the legatee absolutely. *Dowd v. Dowd*, (1898) 1 Ir. 244.

Direction to settle strictly.

If the direction is to make a *strict* settlement, but no intention is shown to benefit children, the property will be settled upon the legatee in such a way as to exclude her husband and children. *Loch v. Bagley*, 4 Eq. 122.

But a direction to settle a legacy upon the legatee by her settlement has been held to import the usual trusts of a marriage settlement, including trusts for children. *Duckett v. Thompson*, 11 L. R. Ir. 424; see also *Earl of Mountcashel v. Smyth*, (1895) 1 Ir. 346.

Intention to benefit children.

If an intention is shown that the children of the legatee are to be benefited, the settlement will contain a power of appointment in the legatee with limitations in default of appointment in favour of children who, being males, attain twenty-one, or, being females, attain twenty-one or marry, as tenants in common. *Young v. Macintosh*, 13 Sim. 445; *Stanley v. Jackman*, 23 B. 450; *Taggart v. Taggart*, 1 Sch. & L. 84; *Cogan v. Duffield*, 2 Ch. D. 44; see *Oliver v. Oliver*, 10 Ch. D. 765; *Eustace v. Robinson*, 7 L. R. Ir. 83; *In re Gowan*; *Gowan v. Gowan*, 17 Ch. D. 778.

But no power of appointment will be given where an intention is shown that the children are to take equally. *In re Parrott*; *Walter v. Parrott*, 33 Ch. D. 274.

Intention to benefit husband.

Where there is an intention to benefit a husband or wife, the husband and wife will take a joint power of appointment. *In re Gowan*; *Gowan v. Gowan*, 17 Ch. D. 778.

If the trustees have a discretion as to the form of settlement

a power may be inserted enabling the legatee to appoint a life interest to a husband. *Charlton v. Rendall*, 11 Ha. 296. Chap. XLV.

Where a testator directed 10,000*l.* to be settled upon a married daughter; "at her death 8,000*l.* of the above sum to be divided equally amongst her children, and the remaining 2,000*l.* to be given to her husband, if living," it was held that the gift must be confined to her then husband and her children by him. *In re Parrott; Walter v. Parrott*, 38 Ch. D. 274.

But where the testator, by a gift over if the legatee died "without leaving any issue her surviving" showed that he contemplated children by any marriage taking, it was held that a gift of a life interest to the legatee's husband included a second husband. *Nash v. Allen*, 42 Ch. D. 54.

Under a direction to settle for the benefit of the legatee and her issue to the exclusion of a husband, the ultimate trusts will be for the appointees of the legatee by will and in default of appointment for her absolutely. *Stanley v. Jackman*, 23 B. 450. Ultimate trusts.

A covenant in executory marriage articles to settle real estate on issue will be carried out by successive limitations to the first and other sons, and so on. *Dod v. Dod*, Amb. 274; *Hart v. Middlehurst*, 3 Atk. 373; *Phillips v. James*, 13 W. R. 934; *In re Grier*, I. R. 6 Eq. 386.

In the execution of executory trusts by the Court the question arises whether the tenants for life are to be dispunishable for waste or not.

In what cases tenants for life will be unimpeachable for waste.

1. Where the executory trust is in such a form as would give the first taker an estate of inheritance, but the general object of the trust can only be effected by cutting down that estate to an estate for life, the life estates are made unimpeachable for waste. *Leonard v. Earl of Sussex*, 2 Vern. 526; *White v. Briggs*, 15 Sim. 17; 2 Ph. 583.

And, therefore, where estates are directed to go to the support of a title granted to a man and the heirs of the body, the estate of the first taker being cut down to a life estate in execution of the trust, will be dispunishable for waste. *Woolmore v. Burrows*, 1 Sim. 512; *Banks v. Baroness Le*

Chap. XLV. *Spencer*, 10 Sim. 576; 11 Sim. 508; *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543.

A direction that the trust is to be executed in strict settlement without more, *i.e.*, where no estate for life is expressly given, implies that the estates for life are to be dispunishable for waste. See *Davenport v. Davenport*, 1 H. & M. 775.

And, upon the same principle, if the trust is to be executed in strict settlement, powers which would diminish the estate will not be inserted under a direction to insert the usual powers. *Higginson v. Barneby*, 2 S. & St. 516; see *Sackville-West v. Viscount Holmesdale*, *supra*.

2. But if the testator has expressly, or by reference to other trusts, directed a life estate to be given, the power to commit waste will not be added to the life estate. *Davenport v. Davenport*, 1 H. & M. 775.

And if life estates are directed by the testator to be given, the words "in strict settlement" will not make the life estates dispunishable for waste. *Stanley v. Coulthurst*, 10 Eq. 259.

A direction to settle without power of anticipation is inconsistent with a power to commit waste. *Clive v. Clive*, 7 Ch. 433.

Restraint  
upon antici-  
pation.

Property to be settled to the separate use of a married woman will be settled with a restraint upon anticipation. *Turner v. Sargent*, 17 B. 515; *Stanley v. Jackman*, 23 B. 450; *Re Dunnill's Will*, 1. R. 6 Eq. 322; see *Symonds v. Wilkes*, 11 Jur. N. S. 659; *In re Parrott*; *Walter v. Parrott*, 33 Ch. D. 274.

Real estate directed to be settled will be settled as realty. *Turner v. Sargent*, 17 B. 515.

What powers  
will be  
inserted in a  
settlement  
executed by  
the Court.

A simple direction to settle will, it seems, authorise the insertion of powers of management, such as powers of leasing, and sale and exchange. *Turner v. Sargent*, 17 B. 515; *Wise v. Piper*, 13 Ch. D. 848.

And where "usual powers" are expressly authorised, powers of leasing, of sale and exchange, and, if necessary, of partition and of leasing mines and of granting building leases, will be inserted, but not powers to confer personal privileges upon particular persons. *Peake v. Penlington*, 2 V. & B. 311;

*Hill v. Hill*, 6 Sim. 136; see *Duke of Bedford v. Marquis of Abercorn*, 1 M. & Cr. 312, p. 334; *Higginson v. Barneby*, 2 S. & St. 516; *In re Grier*, I. R. 6 Eq. 386. Chap. XLV.

Hotchpot clauses will, as a rule, be inserted. *Miller v. Gulson*, 13 L. R. Ir. 408; see *Lees v. Lees*, I. R. 5 Eq. 549.

Where certain powers are given to tenants for life if qualified, and if not qualified, to trustees for them, general words will not authorise powers of sale and exchange. *Brewster v. Angell*, 1 J. & W. 625; *Horne v. Barton*, Jac. 437.

And where certain powers are given, general words will, as a rule, authorise only powers of a like nature; they will not, for instance, authorise the insertion of a power to grant building leases when a power to lease is expressly given. *Pearse v. Baron*, Jac. 158.

The general words may, however, be so placed as to show that their generality is not to be controlled. *Lindon v. Fleetwood*, 6 Sim. 152.

## CHAPTER XLVI.

## IMPLICATION.

## IMPLICATION OF ESTATES TAIL.

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Gift over  
upon an  
indefinite  
failure of  
issue.

The Court  
will not con-  
structively  
limit the  
failure of  
issue, so as to  
prevent the  
implication of  
an estate tail.

Whether an  
estate tail  
will be implied  
from a gift  
over in default  
of issue of a  
person who  
takes nothing  
under the  
will.

IF there is a devise to A. simply, or to A. for life, followed by a gift over in default of issue, if these words import an indefinite failure of issue, A. takes an estate tail. *Machell v. Weeding*, 8 Sim. 4; *Daintry v. Daintry*, 6 T. R. 307; *In re Banks' Trusts*, 2 K. & J. 387.

And in wills before the Wills Act, if the limitation is to A. simply, or to A. for life, with a gift over in default of issue, A. will take an estate tail, though there are words which might constructively limit the failure of issue within a definite period, since this is the only construction which will carry anything to the issue. *Wyld v. Lewis*, 1 Atk. 492; *Simmons v. Simmons*, 8 Sim. 22 (where the devise was in effect to A. for life, and if she dies without issue over, the power to appoint to issue being merely discretionary); *Butt v. Thomas*, 11 Ex. 285; 1 H. & N. 109.

As to whether an estate tail will be implied in a person, from a gift over in default of his issue simply, where no interest is given to him by the will, see *Parker v. Tootal*, 11 H. L. 143; *Walter v. Drew*, Com. Rep. 373.

And where, in a devise to A. for life, remainder to his children either for life or in tail, an estate tail is implied in A. from a gift over in default of issue, the estate tail so implied will be in remainder, to take effect after the prior estates expressly limited. *Doe d. Bean v. Halley*, 8 T. R. 5; *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621; 3 Ad. & E. 340; *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93; *Andrew v. Andrew*, 1 Ch. D. 410.

Where in a will after the Wills Act lands were devised to A. "during his life and to his eldest son and his heirs in tail male; and in default of issue" over, an estate in tail male was implied in A. subsequent to the estate in tail male in his eldest son. *Neville v. Thacker*, 23 L. R. Ir. 344.

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And where an estate tail is to be implied either in an ancestor or his issue, it will be implied in the ancestor, so as to take in the whole line of issue. *Atkinson v. Barton*, 10 H. L. 213; *Forsbrook v. Forsbrook*, *supra*.

As between father and son, an estate tail will be implied in the father.

## IMPLICATION OF LIFE ESTATES.

### I. As regards Real Estate.

If there is a devise of realty to the heir-at-law after the death of A., A. will take an estate for life by implication. It is evident that the heir who would take in case of intestacy is not meant to take immediately, and the only way of carrying out the testator's intention is to give A. a life estate. "A. must have the thing devised or none else can have it." *Gardner v. Sheldon*, Vaughan, 259; Tudor, L. C. 625.

Devise to the heir-at-law after the death of A., gives A. a life estate.

But a devise to a stranger after the death of A. gives A. no estate by implication, since the heir-at-law may have been intended to take in the meantime. *Aspinall v. Petrin*, 1 S. & St. 544.

In order that A. may take a life estate the person to whom the lands are given after the death of A. must be the heir-at-law at the time of the devise, and not at the time when the devise takes effect. *Aspinall v. Petrin*, *supra*.

Person to take on the death of A. must be heir at date of devise.

Similarly, a devise to one of several co-heiresses after the death of A. gives A. a life estate. *Hutton v. Simpson*, 2 Vern. 723, as stated in *King v. Ringstead*, 9 B. & C. 218, p. 228; see *Rhodes v. Rhodes*, 7 App. C. 192.

Devise at the death of A. to one of several co-heiresses.

The rule does not apply where the devise is to the heir and others after the death of A. *Ralph v. Carrick*, 11 Ch. D. 873.

Devise at the death of A. to the heir and others.

The express gift of certain lands to A. does not in itself prevent him from taking other lands by implication. See 13 Hen. VII., f. 17; Brook, Devise, pl. 52, cited in *Gardner v. Sheldon*, Vaughan, 259; Tudor, L. C. 4th Ed. 388, 392.

Whether an express devise to A. will prevent him from taking by implication.

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Therefore, where lands are devised to A. for life, and after the death of A. the lands previously devised, together with other lands, are devised to B., A. will or will not take an estate for life by implication in the other lands, according as B. is the heir or a stranger. *Aspinall v. Petvin*, 1 S. & St. 544; *King v. Ringstead*, 9 B. & C. 218; *Attwater v. Attwater*, 18 B. 390.

Distributive construction where lands, in some of which A. takes a life estate, are given at his death to the heir.

But words which taken in their grammatical sense are joint and apply to the two classes of property, will be construed distributively if the intention of the testator is manifest that the lands not expressly devised for life are to go to the devisees at once. *Cook v. Gerard*, 1 Saund. 183, cit. 9 B. & C. 225; *Simpson v. Hornsby*, 2 Vern. 728; Prec. Ch. 439, 452; *Doe v. Brazier*, 5 B. & Ald. 64; see *Rhodes v. Rhodes*, 7 App. C. 192, where a devise after the death of A. was held under a peculiar will to vest immediately.

The mere fact that provision has already been made for A. will be an argument against giving a life estate by implication, and therefore in favour of a distributive construction. See *Sterens v. Hale*, 2 Dr. & Sm. 22; *James v. Shannon*, 1 R. 2 Eq. 118.

No implication where possession postponed till A.'s death.

Of course, if the devise after the death of A. can be construed as merely postponing the vesting in possession till the death of A., no argument in favour of implication can arise. *Barnet v. Barnet*, 29 B. 289.

Effect of a residuary devise.

And in the same way, if there is a residuary devise, so that nothing is undisposed of, there can be no implication. *Horton v. Horton*, Cro. Jac. 74.

## II. As regards Personal Estate.

Bequest of personalty to the next of kin after A.'s death.

By analogy to the rule with regard to real property, it appears that if personal property be given to the next of kin after the death of A., A. will take a life interest by implication, if there is no residuary bequest. *Sterens v. Hale*, 2 Dr. & Sm. 22; *Cock v. Cock*, 21 W. R. 807; *Blackwell v. Bull*, 1 Kee. 176. In *Horton v. Horton*, Cro. Jac. 74, there was in effect a residuary bequest according to the then state of the law.

A life interest will not be implied in A. where the persons to take on his death are not the next of kin or are the next of



kin along with other persons or are only some of the next of kin. *Ralph v. Carrick*, 11 Ch. D. 873 ; *Woodhouse v. Spurgeon*, 49 L. T. 97 ; *Green v. Flood*, 15 L. R. Ir. 450 ; *In re Springfield* ; *Chamberlin v. Springfield*, (1894) 3 Ch. 603. Chap. XLVI.

In order to imply a life interest in A. there must be something more than a mere gift after his death. Some of the earlier cases in which a life interest has been implied would probably not now be followed. See *Roe v. Summerset*, 5 Burr. 2608 ; *Bird v. Hunsdon*, 2 Sw. 342 ; *Humphreys v. Humphreys*, 4 Eq. 475.

In the case of marriage settlements settling property on the wife during coverture and providing for her death during the husband's life, with limitations after the death of the survivor, but containing no provision for the event of the wife surviving the husband, a life interest has in that event been implied in the wife. *Tunstall v. Trappes*, 3 Sim. 312 ; *Allin v. Crawshaw*, 9 Ha. 382. Implication in marriage settlement.

So in wills after a life interest to A., with a life interest in certain events to B., followed by a gift over after the death of A. and B., a life interest has been implied in B. though the events did not happen. *In re Betty Smith's Trusts*, L. R. 1 Eq. 79 ; *In re Blake's Trust*, 3 Eq. 799 ; see *Isaacson v. Van Moor*, 42 L. J. Ch. 198 ; 21 W. R. 156. Intention to give life interest.

Where the testator's widow was directed to carry on the testator's business and after his death he directed his property to be divided among his children, the widow took a life interest in the property upon the general intention to keep the family together. *Blackwell v. Bull*, 1 Kee. 176 ; see *Cockshott v. Cockshott*, 2 Coll. 432.

A residuary bequest or a gift in default of appointment where the bequest after the life of A. is made under a power, affords an argument against the implication of a life interest. *Cranley v. Dixon*, 23 B. 512 ; *Henderson v. Constable*, 5 B. 297. Effect of a residuary bequest.

There is no implication in favour of A. where the gift is if A. dies under twenty-one or unmarried, since in such a case an absolute interest and not a life estate would have to be implied. *James v. Shannon*, 1 R. 2 Eq. 118 ; *Harris v. Du Pasquier*, 20 W. R. 668. No implication arises in favour of A., where the gift is if A. dies under 21, to B.

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## IMPLICATION OF ABSOLUTE INTERESTS.

Gift to A.  
till 21, with a  
gift over if he  
dies under 21.

1. If there is a gift to A. till twenty-one with a gift over if he dies under twenty-one, A. will take by implication the fee or an absolute interest in personalty, defeasible upon death under twenty-one. *Tomkins v. Tomkins*, cited 1 Burr. 234; *Paylor v. Pegg*, 24 B. 105; *Gardiner v. Stevens*, 30 L. J. Ch. 199; *In re Harrison's Estate*, 5 Ch. 408.

The argument in favour of implication is strengthened if the residuary legatees or devisees are different from those who would take under the gift over, so that without implication the property would go to different persons, according as A. died under or over twenty-one. *Cropton v. Davies*, L. R. 4 C. P. 159.

Gift till 21.

2. A simple gift to trustees in trust for A. till he attains twenty-one will not give A. the absolute interest. *In re Hedley's Trusts*, 25 W. R. 529; see *McCutcheon v. Allen*, 5 L. R. Ir. 268.

But very slight indications of intention have been held sufficient to give the absolute interest, though possibly some of the earlier decisions may be difficult to support.

In some cases the Court has found a direct gift to the legatee, with a superadded direction that it was to be in trust till he should come of age. *Atkinson v. Paice*, 1 B. C. C. 91; *Hale v. Beck*, 2 Ed. 229; see *Tunaley v. Roch*, 3 Dr. 720.

In others an absolute interest has been implied from a direction that the trust is to cease at twenty-one, or from a reference to the trustees as trustees for the legatees. *Peat v. Powell*, Amb. 387; 1 Ed. 479; *Wilks v. Williams*, 2 J. & H. 125.

Or, again, an absolute interest has been given because the trustees are directed to apply not only the interest but the produce till the legatees attain twenty-one. *Newland v. Sheppard*, 2 P. W. 194.

Effect of a  
gift to A. till  
21. for the  
benefit of him-  
self and  
another.

3. But the implication will be rebutted if there are circumstances tending to show that the person to take till twenty-one is not to take an absolute interest if he survives twenty-one; if, for instance, the gift is to the wife for her and her son's support till the son attains twenty-one, and if he dies under

twenty-one, to the wife for life, and then over. In this case the son did not take the whole interest till twenty-one, and it could therefore hardly be implied that he was to take the whole after that age to the exclusion of his mother. *Fitzhenry v. Bonner*, 2 Dr. 36.

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4. No implication in favour of children arises upon an absolute gift of personalty to A. and if he dies without children over, or upon a gift to several as tenants in common and if any die without issue their shares to those then living or their children. *Addison v. Busk*, 14 B. 459; 2 D. M. & G. 810, sub nom. *Lee v. Busk*; *Cooper v. Pitcher*, 4 Ha. 485; 16 L. J. Ch. 24; *Dowling v. Dowling*, L. R. 1 Eq. 442; *ib.* 1 Ch. 612.

No implication in favour of children arises in a gift to A. absolutely, and if he dies without children over.

But where there was a gift of a share of residue to A. followed by an accruer clause on his death before the testator "without leaving any children lawfully to inherit," a gift to children was implied. *M'Clean v. Simpson*, 19 L. R. Ir. 528.

5. Nor does any implication in favour of children arise if the gift is to A. for life and if he dies without children over. *Greene v. Ward*, 1 Russ. 262; *Ranelagh v. Ranelagh*, 12 B. 200; *Sparks v. Restal*, 24 B. 218; *Neighbour v. Thurlow*, 28 B. 33; *Re Hayton's Trusts*, 4 N. R. 54; *Seymour v. Kilbee*, 3 L. R. Ir. 33; *In re Rawlins' Trusts*, 45 Ch. D. 299; *S. C. Scalé v. Rawlins*, (1892) A. C. 342. *Ex parte Rogers*, 2 Mad. 449, probably went too far.

Gift to A. for life, and if he dies without children over.

So in the case of real estate, a gift over in default of issue of A. following limitations to A. for life with remainder to his first son for life, with remainder to the first son of the first son in tail, with remainder to every other son of A. successively for like interests, will not give the second and other sons of the first son of A. estates by purchase. *Monypenny v. Dering*, 7 Ha. 568.

6. But though after a gift to A. for life the mere gift over in default of children will not be sufficient to give the children any interest by implication, there may be circumstances to fortify the argument based upon the gift over, so as to give the children an interest. For instance, where the gift over was not merely on the death of the tenant for life without

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Gift to A. to dispose of among a certain class at his death.

7. Possibly where there is a gift to A. to dispose of among a certain class by deed or will, a life interest would be implied in A. *Acheson v. Fair*, 3 D. & War. 527. See *Williams v. Roberts*, 27 L. J. Ch. 177; 4 Jur. N. S. 18.

Bare power to appoint to A.

8. A bare power to appoint a sum of money to a particular person will not give that person any interest if the power is not exercised. *Bull v. Vardy*, 1 Ves. Jun. 270; see *Tweeddale v. Tweeddale*, 7 Ch. D. 693.

Wide discretion not exercised.

If a wide discretion is given to trustees to apply a fund in the maintenance of a son or in augmentation of the shares of the other children, there is no implied gift if the trustees refuse to exercise their discretion. *Re Eddowes*, 1 Dr. & Sm. 395.

Life interest with power to appoint.

Where there is a life interest with a power to the life tenant to appoint to his children but no gift to the children, and no gift over in default of appointment, the children will take nothing in default of appointment (a), unless an intention can be gathered that the power is in the nature of a trust which the donee is bound to exercise (b). *Healy v. Donnery*, 3 Ir. C. L. 213; *In re Weekes' Settlement*, (1897) 1 Ch. 289; *Carberry v. McCarthy*, 7 L. R. Ir. 328; *In re Hall*; *Sheil v. Clark*, (1899) 1 Ir. 308 (a); *Witts v. Boddington*, 3 B. C. C. 95; *Forbes v. Ball*, 3 Mer. 437; *Birch v. Wade*, 3 V. & B. 198; *Re White's Trusts*, Joh. 656; *Salisbury v. Denton*, 3 K. & J. 529; *In re Patterson*; *Dunlop v. Greer*, (1899) 1 Ir. 324; see *Ahearne v. Aherne*, 9 L. R. Ir. 144 (b).

If the gift can be construed as a gift to the children with a power of selection in the tenant for life which is not exercised the gift to the children will take effect. This construction has been adopted in several cases where the provision was for such children as the tenant for life or as trustees should appoint. *Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; *Burrough v. Philcox*, 5 M. & Cr. 73; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Re White's Trusts*, Joh. 656; *Carthew v. Enraght*, 20 W. R. 743; *In re Brierley*; *Brierley v. Brierley*, 43 W. R. 56.

A gift over in default of objects of the power is a strong indication that the property was not to go over if there were any objects of the power. *Butler v. Gray*, 5 Ch. 26. Chap. XLVI.

If there is a gift over in default of appointment there can be no implication in favour of the objects of the power. *Pattison v. Pattison*, 19 B. 638; *Richardson v. Harrison*, 16 Q. B. D. 85, disapproving *In re Jeffery's Trusts*, 14 Eq. 136; *Re Sprague*; *Miley v. Cape*, 43 L. T. 236; *In re Lyons & Carroll's Contract*, (1896) 1 Ir. 383.

#### IMPLICATION OF CROSS-REMAINDERS.

1. If there is a devise of lands to two or more as tenants in common and the heirs of their bodies respectively, followed by a gift over in default of such issue, the gift over takes effect only in default of all such issue as would take under the antecedent limitations, and therefore cross-remainders are implied between the tenants in tail. *Doe d. Gorges v. Webb*, 1 Taunt. 234; *Powell v. Howells*, L. R. 3 Q. B. 655; *Hannaford v. Hannaford*, L. R. 7 Q. B. 116. See *Askew v. Askew*, 57 L. J. Ch. 629; 58 L. T. 472; 36 W. R. 620.

Cross-remainders implied in devise to several in tail, with gift over in default of issue to take under preceding limitations.

And if the gift over is limited not expressly in default of issue, but as a remainder, the same result follows. *Doe d. Burden v. Burrille*, 2 East, 47, n.

Where the gift over is limited as a remainder or reversion.

The word reversion would probably now be held to have the same force, notwithstanding *Pery v. White*, Cowp. 777.

The arguments against the implication of cross-remainders founded upon the number of the devisees and such words as severally or respectively, or the fact that *the whole* is not expressly given over cannot now be considered as having any weight.

2. The result will be the same if the gift over is in default of issue to take under the preceding limitations, living at the death of their parents. *Maden v. Taylor*, 45 L. J. Ch. 569.

Gift over in default of issue living at deaths of ancestors.

3. It has been said that if cross-remainders are provided between certain objects in certain events, the implication of cross-remainders between those objects in different events does not arise; so that, for instance, if cross-remainders are provided between the children of separate families among themselves,

Whether the limitation of cross-remainders in certain events prevents the implication of cross-remainders.

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cross-remainders would not be implied between the children of one family and those of the other. *Clache's Case* (Dyer, 330), however, which is usually cited on this point, is no authority for any such proposition. All that case decides is, that cross-remainders cannot be implied in the face of an express limitation over in a certain event with which such an implication would be inconsistent. See the remarks by Turner, L.J., in *Atkinson v. Barton*, 3 D. F. & J. 339. And the decision in *Rabbeth v. Squire*, 19 B. 77; 4 De G. & J. 406, was based on totally different grounds. The true rule is laid down by Turner, L.J.: "Cross-remainders are to be implied or not according to the intention. The circumstance of remainders having been created between the parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it." *Atkinson v. Barton*, 3 D. F. & J. 339 (reversed on appeal, but on different grounds, 10 H. L. 313); see, too, *Vanderplank v. King*, 3 Ha. 1; *Re Ridge's Trusts*, 7 Ch. 665; *In re Hudson*; *Hudson v. Hudson*, 20 Ch. D. 406 (where the rules deducible from the cases are stated); *Re Rabbits*; *Gill v. Worrall*, 79 L. T. 313.

Cross-remainders implied between persons taking different interests.

4. Cross-remainders will be implied even though, as the result of legal rules and not of the testator's intention, the class of persons between whom they are implied take different interests; if, for instance, some are tenants in tail, others only tenants for life, with remainders to their children in tail. *Vanderplank v. King*, 3 Ha. 1.

Cross-remainders implied between tenants for life.

5. Cross-remainders will be implied in a devise to the children of A., which carries to them only a life estate, with a gift over for want of such issue of A. *Ashley v. Ashley*, 6 Sim. 358.

Cross-remainders implied between the families where the limitations are for life, with remainder to children.

6. And where realty or personalty is given to several persons as tenants in common for life with remainders to their issue, followed by a gift over if all should die without leaving issue, cross-limitations between the first takers and their families will be implied. *Re Ridge's Trusts*, 7 Ch. 665; *Re Clark*, 11 W. R. 871; see, too, *Coates v. Hart*, 3 D. J. & S. 504.

Cross-limitations

7. But cross-limitations will not be implied so as to divest vested interests. The implication arises from the presumption

against intestacy, but where there are vested interests there can be no intestacy. See *Rabbeth v. Squire*, 19 B. 70; 4 De G. & J. 406; *Re Clark*, 11 W. R. 871; *Sutton v. Sutton*, 30 L. R. Ir. 251.

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will not be implied so as to divest vested interests.

Upon the same principle, when the testator has disposed of his whole interest in realty or personalty; if, for instance, absolute vested interests have been given to several as tenants in common, with a gift over upon the death of all in certain events; cross-limitations cannot be implied between them, as there can be no intestacy, and cross-limitations would divest vested interests. *Skey v. Barnes*, 3 Mer. 334; *Bromhead v. Hunt*, 2 J. & W. 459; *Baxter v. Losh*, 14 B. 612; *Beaver v. Nowell*, 25 B. 551.

8. If, however, the interests are not vested, but contingent with a gift over upon the death of all before the interests vest, the argument against an intestacy applies, and no argument can be raised against cross-limitations on the ground that they would divest vested gifts, and therefore in all probability cross-limitations would be implied. *Mackell v. Winter*, 3 Ves. 236, 536; *Scott v. Bargeman*, 2 P. W. 68; 2 Eq. Ab. 542; *Graves v. Waters*, 10 Ir. Eq. 234.

Gift over of contingent interests, if all the legatees die before the time of vesting.

There are no grounds for supposing *Scott v. Bargeman* to be overruled. The point in *Beauman v. Scott*, 2 Ba. & Be. 406, was totally different. It was whether benefit of survivorship would be implied between tenants in common taking vested interests, and the incidental remarks of Lord Manners cannot be considered as overruling a case expressly approved by Lord St. Leonards in *Vize v. Stoney*, 1 Dr. & War. 348, and followed in *Graves v. Waters*.

As to the circumstances under which cross-remainders apply to an accruer clause, see *Sutton v. Sutton*, 30 L. R. Ir. 251.

**IMPLICATION BY RECITAL.**

1. A recital, that a person is entitled under another instrument, when he is not in fact entitled, does not in general amount to a gift by the instrument which contains the recital. *Wright v. Wygrell*, 2 Vent. 56; *Harris v. Harris*, 1 R. 3 Eq. 610; *Circuit v. Perry*, 23 B. 275; *Re Bagot*; *Paton v.*

A recital that a person is entitled under another instrument.

**Chap. XLVI.** *Ormerod*, (1893) 3 Ch. 348; *Harcerty v. Curtis*, (1895) 1 Ir. 23; not following *Hall v. Lietch*, 9 Eq. 376.

Recital in the will of a gift by the will.

2. It has been said that a recital in the will itself of a gift as made by the will, when in fact it contains no such gift, is "conclusive evidence of an intention to give by the will," and amounts to a gift. See *Adams v. Adams*, 1 Ha. 540; and per Lord Brougham, "If a man says 'I have in the first part of my will given such an estate to A.,' A. shall have that estate though the gift is not contained in the first part of the will," 3 Cl. & F. p. 572.

There appears to be no decision in support of this doctrine. It must be a question of construction in each case whether the mention of the supposed gift itself amounts to a gift or not.

Erroneous recital by codicil.

3. A reference by codicil to something as given by the will which is not in fact given, when there is something else given to which the codicil is an incorrect reference, or an inaccurate recital of a gift by will, for instance, a recital of what was a life interest as if it were an estate tail, will not affect the will or amount to a gift. *Skerratt v. Oakley*, 7 T. R. 492; *Smith v. Fitzgerald*, 3 V. & B. 2; *Cosby v. Millington*, 38 L. J. C. P. 373; *Re Arnold's Estate*, 33 B. 163; *Mackenzie v. Bradbury*, 35 B. 617; *Nugent v. Nugent*, 1 R. 8 Eq. 78.

Still less can a gift be implied from a recital when the effect of such implication would be to cut down a prior express gift as from a recital of a gift to B. for life with remainder to his children, when the prior gift was to the children immediately. *Re Smith*, 2 J. & H. 594.

A devise of land subject to the widow's dower does not give the widow a right to dower which she had not before. *Adams v. Adams*, 1 Ha. 537.

Gift in addition to supposed gift.

4. A simple gift to a legatee of A., in addition to B., would no doubt pass both A. and B. This is not a case of implication at all.

Thus, a gift by a testatrix to a legatee of 300*l.*, "in addition to the sums owing to her from my late husband's estate," where the testatrix was her husband's executrix and residuary legatee, was held to be a gift of two sums of 500*l.*, for which the



husband had given the legatee promissory notes without consideration, as well as of the 300*l.* *In re Rowe; Pike v. Hamlyn*, (1898) 1 Ch. 153. Chap. XLVI.

But a gift by codicil of A., in addition to B., which the testator goes on to say he has already given by his will, when he has not in fact given it, stands on a different footing. The words "in addition to" are not intended to operate by way of gift, as the testator thinks that he has already given B. The point appears not to have arisen in this simple form.

In *Farrer v. St. Catharine's Coll.*, 16 Eq. 19, the testator by codicil confirmed a supposed gift by will and gave a sum in addition, and it was held the College took both.

In *Jordan v. Fortescue*, 10 B. 259, a gift by a third codicil of "500*l.* in addition to 1,500*l.* before bequeathed," where 500*l.* had been given by the will and 500*l.* by a first codicil, was held to be a gift of 2,000*l.* in all. This was a strong case, as the reference to the 1,500*l.* might very well have been considered a mere mistaken reference to the sums already given.

In *Morgan v. Middlemass*, 35 B. 278, a testator gave his wife 500*l.*, and by a codicil gave her a "further sum not exceeding 300*l.*, making altogether a legacy of 1,000*l.* given to her by my will and the codicil," and it was held that there was a miscalculation only, and that the widow could take only the 500*l.* and 300*l.*

The result appears to be that a gift in addition to a gift supposed to have been already given will not amount to a gift of the sums supposed to have been given unless there is a context to assist the gift.

5. Conversely, a gift made upon a mistaken supposition of fact cannot be cut down or altered to suit the supposed facts. Gift made upon a mistake of facts.  
*Westcott v. Culliford*, 3 Ha. 265; *Ires v. Dodgson*, 9 Eq. 401.

## CHAPTER XLVII.

## REVOCATION.

**Chap. XLVII.**

Revocation  
before the  
Wills Act.

PRIOR to the Wills Act a devise was revoked if the testator afterwards made a conveyance of the land for any purpose (except a mortgage), though the conveyance was only of the legal estate. *Lord Lincoln's Case*, Show. P. C. 154; 1 Eq. Ab. 411, pl. 1; 1 Jarm., 4th ed. 147; 5th ed. 128.

Partition was no exception to the general rule where a conveyance was made to a trustee to divide, though, if the partition was effected by a mere release to uses, there was no revocation. *Grant v. Bridger*, L. R. 3 Eq. 347.

And a devise of land contracted to be purchased was revoked if the testator took a conveyance of the land to dower uses. *Rawlins v. Burgess*, 2 V. & B. 382; *Plowden v. Hyde*, 2 D. M. & G. 687; *Jacob v. Jacob*, 78 L. T. 451, 825; 82 L. T. 270.

Effect of s. 23  
of Wills Act.

Now, by sect. 23 of the Wills Act, it is provided that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate, as the testator shall have power to dispose of by will at the time of his death.

The section  
does not  
apply to cases  
of ademption.

This section applies to cases in which a gift would have been formerly revoked by alteration of estate, but not to cases of ademption. *Moor v. Raisbeck*, 12 Sim. 123; *Ford v. De Pontes*, 30 B. 572.

Effect of s. 19  
of Wills Act.

Sect. 19 of the Wills Act provides that no will shall be

revoked by any presumption of an intention on the ground of an alteration of circumstances. Chap. XLVII.

Therefore, where a will disposed of a fund which the testator afterwards disposed of by a deed in such a way that the latter disposition was void as to one-fifth, that fifth passed under the will. *In re Wells; Hardisty v. Wells*, 42 Ch. D. 646.

The subject of revocation of testamentary instruments has been treated *ante*, pp. 37—50. The cases upon revocation as a question of construction are so special that they are of little use as general authorities, and hardly admit of a satisfactory classification.

The following points may, however, be noticed :—

1. To cut down a previous gift it must be reasonably clear that it was meant to be cut down. The rule is not that the words of revocation must be as clear as the words of original gift. See *Randfield v. Randfield*, 8 H. L. 225; *Wallace v. Seymour*, 20 W. R. 634; *Beamish v. Beamish*, 1 L. R. Ir. 501.

It must be reasonably clear that a bequest is meant to be revoked.

Where a testatrix gave a watch and sum of money to A., and by codicil, after reciting the gift of the watch, revoked the said legacy and declared that her will should be read as if A.'s name had not been inserted therein, it was held that the legacy of money was not revoked. *Re Percival; Boote v. Dutton*, 59 L. T. 21.

If property is given to A. for life with remainder for her children, and by a codicil all gifts in favour of A. are revoked, the remainder to the children remains. *Green v. Tribe*, 27 W. R. 39; 47 L. J. Ch. 788.

But if the original gift is to A., followed by a direction to settle it, the gift "to or in favour" of A. is revoked. *Tabor v. Prentice*, 32 W. R. 872.

Where property is given to A. for life with remainders over and the gift to A. only is revoked, but the property is given absolutely to B., the whole original gift is revoked. *Murray v. Johnstone*, 3 D. & War. 143; *Fry v. Fry*, 9 Jur. 894; see *Wells v. Wells*, 2 W. R. 6; 17 Jur. 1020; *Hargreaves v. Pennington*, 12 W. R. 1047.

So, where there is a gift to A. with executory limitations

Chap. XLVII. over, and the trusts of the will as regards the gift to A. are revoked, the gifts over are revoked as well. *Boulcott v. Boulcott*, 2 Dr. 25.

Where an estate was devised by the will for life with remainder, and by a codicil the testator directed the estate to be sold, but no directions were given as to the proceeds of sale, it was held that such proceeds must be held on the same trusts as the land. *Re Chifferiel; Chifferiel v. Watson*, 73 L. T. 53.

A revocation of all devises and bequests in favour of A. revokes a special power of appointment by will given to A. *In re Brough; Currey v. Brough*, 38 Ch. D. 456.

Where, under a special power to appoint to her children, a testatrix appointed to them and, upon the death of one of them, she appointed her share to her children, it was held that the appointment by the will was not revoked by the limited appointment by the codicil. *Duguid v. Fraser*, 31 Ch. D. 449.

Gifts will not be considered revoked further than is necessary.

2. The dispositions of the will will not be disturbed more than is necessary to give effect to a revocation by codicil.

Where there was a gift to a daughter for life and then to her children, and by codicil the testator expressed a wish that his daughter should not marry, and in case of her marriage or death gave the property over, it was held that the gift over was intended to take effect upon marriage or death, whichever first happened, and that as the gift over on marriage was invalid and the daughter had married and left children, the gift over could not take effect, and the children took. *Morley v. Rennoldson*, (1895) 1 Ch. 449.

Where annuities were given to certain persons and then to their children, and by codicil smaller annuities were substituted for the annuities given to those persons, there being no reference to the children, it was held that the smaller annuities were substituted as regards the children as well. *In re Freme's Contract*, (1895) 2 Ch. 778.

Where a legacy is charged on real and personal estate and the charge on the personal estate is revoked by a codicil, the charge on the realty remains. *Kermode v. Macdonald*, 3 Ch. 585; *Leese v. Knight*, 12 W. R. 1097.

Where a legacy is charged on two funds, one of which is afterwards by a codicil given free from the charge, the charge remains on the other fund and does not abate in the proportion of the two funds. *Tatlock v. Jenkins*, Kay, 654. Chap. XLVII.

So, too, when land is given subject to a charge to A., and the devise is afterwards revoked, the charge remains. *Beckett v. Harden*, 4 Mau. & S. 1; see *Grice v. Funnell*, 1 Sm. & G. 130.

A legacy which is revoked is not set up again because the disposition in favour of which the revocation is made is incomplete or incapable of taking effect. *Tupper v. Tupper*, 1 K. & J. 665; *Nerill v. Boddam*, 28 B. 554; *Quinn v. Butler*, 6 Eq. 225; see *Onions v. Tyrer*, 1 P. W. 348; 2 Vern. 742; *Baker v. Story*, 23 W. R. 147; see *ante*, p. 42.

Where personalty is directed to go upon the same trusts as realty, and the trusts of the realty are afterwards revoked or altered, then, if an intention can be gathered from the will and codicil to keep the two classes of property united, the limitations of the personalty will follow the altered limitations of the realty. *Lord Carrington v. Payne*, 5 Ves. 404; *In re Towry's Settled Estate*; *Dallas v. Towry*, 41 Ch. D. 64; see *Re Gibson*, 2 J. & H. 656.

Personalty given on trusts of realty which are revoked.

But if no such intention appears, the original gift of the personalty remains. *Lord Beauclerk v. Mead*, 2 Atk. 167; *Darley v. Langworthy*, 3 B. P. C. 359; *Agnew v. Pope*, 1 De G. & J. 49; *Martineau v. Briggs*, 23 W. R. 889; *Bridges v. Strachan*, 26 W. R. 691.

The same principle applies if a legacy is given to a person to be ascertained by reference to trusts which are subsequently altered. *In re Towry's Settled Estate*, *supra*.

But if the gift is of money to be laid out in repairing certain premises and the surplus is given to the same persons to whom the premises are devised and this latter devise is revoked, the gift of personalty also fails. *Whiteway v. Fisher*, 9 W. R. 433.

3. Where there is a gift by will, and the testator by a codicil makes a disposition in favour of the legatee which is expressed to be "instead of" the disposition by the will,

Gift by codicil "instead of" gift by will.

Chap. XLVII. the effect may be to substitute the disposition by the codicil entirely for the will, so as in effect to revoke the gift by the will or to leave the gift by the will unaffected, except so far as it is inconsistent with the codicil. *Doe v. Marchant*, 6 Man. & G. 813; *In re Wilcock*; *Kay v. Deuhirst*, (1898) 1 Ch. 95.

Erroneous  
recital will  
not revoke a  
gift.

4. A gift by will is not revoked by an erroneous recital of it by a codicil. *Vaughan v. Foakes*, 1 Kee. 58; *Re Smith*, 2 J. & H. 594; *Mann v. Fuller*, Kay, 624; *Van Grutten v. Foxwell*, (1897) A. C. 658.

But an erroneous recital of a gift does not prevent the revocation of the gift if the subsequent dispositions are inconsistent with it. *Re Margitson*; *Haggard v. Haggard*, 30 W. R. 920; 31 *ib.* 257.

Alteration  
owing to an  
erroneous  
assumption  
of fact.

5. An alteration in or addition to a gift in a will expressed to be made upon an assumption of fact, which turns out to be erroneous, does not take effect. *Campbell v. French*, 3 Ves. 321; *Doe d. Evans v. Evans*, 2 Per. & D. 378; 10 Ad. & E. 228; *Barclay v. Maskelyne*, Johns. 124.

But if the alteration or addition is made because the testator is doubtful whether some fact is true or not, the alteration takes effect. *A.-G. v. Lloyd*, 3 Atk. 552; 1 Ves. Sen. 32; *A.-G. v. Ward*, 3 Ves. 327.

The distinction seems to be not between the fact and the testator's belief in the fact, but between a fact and a possibility which the testator is unable to verify, and therefore an additional gift founded upon an erroneous belief would fall under the former head. *Thomas v. Howell*, 18 Eq. 198.

#### INCONSISTENCY.

The later of  
two inconsis-  
tent gifts  
takes effect.

When two clauses in a will are absolutely irreconcilable the later one is to be preferred. *Crone v. Odell*, 1 Ba. & B. 449; 3 Dow, 61; *Ulrich v. Lichfield*, 2 Atk. 372; *Morrall v. Sutton*, 1 Ph. 533; *Paice v. Archbishop of Canterbury*, 14 Ves. 366.

But where the testator, using a printed form of will, made two residuary gifts, it was held that the first, which was in his writing, prevailed. *Re Spencer*; *Hart v. Manston*, 54 L. T. 597; 34 W. R. 527.

If possible the Court will reconcile two dispositions apparently inconsistent. See *Kerr v. Baroness Clinton*, 8 Eq. 462; *In re Bywater*; *Bywater v. Clarke*, 18 Ch. D. 17. Chap. XLVII.

Thus, if the same property is given to two persons in fee in two different parts of the will, they will take as joint tenants. *Paramour v. Yardley*, Plow. 451; *Bennett's Case*, Cro. Eliz. 9; see *Sherratt v. Bentley*, 2 M. & K. 149, 162. Gift of the same property to two persons.

This does not, however, apply as between will and codicil. *Re Hough's Estate*, 15 Jur. 948; 20 L. J. Ch. 422; *Evans v. Evans*, 17 Sim. 107.

So, too, if land is given to one person without and to another person with words of limitation, the latter will take a fee in remainder. *Gravenor v. Watkins*, L. R. 6 C. P. 500.

Similarly, where immediate interests in fee and in tail or in fee and for life are given in the same lands, the devise of the fee will be construed as a remainder whether the devise of the particular estate precedes the devise of the fee or not. *Wallop v. Derby*, Yelv. 209; see *Conquest v. Conquest*, 16 W. R. 453.

In cases where the whole personalty is given to a person absolutely and then there is a gift of the residue at her decease, the earlier gift has been held to be for life only. *Sherratt v. Bentley*, 2 M. & K. 149; *Re Brook's Will*, 18 W. R. 573; *Hare v. Westropp*, 9 W. R. 689. Gift of the testator's whole estate, and of a residue in the same will.

And the same construction has been adopted where there were no words referring to the death of the first legatee, but the gift was to her children. *In re Bagshaw's Trusts*, 24 W. R. 875; 25 W. R. 659; 46 L. J. Ch. 567.

So, if a testator gives the remainder of his property to A. and makes B. his residuary legatee, B. will take only lapsed legacies. *Re Jessop*, 11 Ir. Ch. 424; *Daves v. Bennett*, 30 B. 226; *Kilrington v. Parker*, 21 W. R. 121; *Bristowe v. Masefield*, 31 W. R. 88. Gifts of the residue and of the remainder in the same will.

But a residuary gift by codicil revokes a residuary gift by will. *Earl of Hardwicke v. Douglas*, 7 C. & F. 795.

Similarly, where a gift of all the testator's property is followed by gifts of specific portions of it or *vice versa*, both gifts may take effect. *Cuthbert v. Lempriere*, 3 Mau. & S. Gifts of all the testator's property, followed by

Chap. XLVII. 158; *Doe d. Snape v. Nevile*, 11 Q. B. 466; *Blamire v. Geldart*, 16 Ves. 314; *In re Arrousmith's Trusts*, 8 W. R. 555; 2 D. F. & J. 474; *Robertson v. Powell*, 3 N. R. 433.

gifts of portions of it.

Where, however, all the testator's personal property was given to the widow for life, subsequent legacies were held to be not payable till after her death. *Burdett v. Young*, 9 Mod. 93; 5 B. P. C. 54.

As between will and codicil the argument is in favour of revocation.

As between a will and codicil, however, the argument is much stronger in favour of revocation. At any rate, where a testator by his will distinguishes between specific legacies and residue and by a codicil gives all his personal property, the codicil revokes the specific legacies as well as the residuary gift. *Kermode v. Macdonald*, L. R. 1 Eq. 457; 3 Ch. 584.



## CHAPTER XLVIII.

## ALTERING WORDS—UNCERTAINTY.

## CHANGING WORDS.

THE Court will change a word when it appears from the context of the will that the word was incorrectly employed by the testator in place of some other word.

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Several cases in which "or" has been changed into "and," and *vice versâ*, have already been mentioned in the discussion of the construction of gifts over. It remains to mention some cases in which a similar change has been made in direct gifts.

When there is a gift to a person upon one or other of two events, "or" will not be read "and," as the result would be to make the conditions cumulative instead of alternative. *Hawksworth v. Hawksworth*, 27 B. 1.

"Or" will not be changed into "and" in a condition precedent.

And it seems in a condition precedent to vesting "nor" will mean "or not," if the result is to vest the gift in either of two events. *Mackenzie v. King*, 12 Jur. 787; 17 L. J. Ch. 448.

"Nor" may mean "or not."

On the other hand, in some cases on the context of the will, "and" has been read "or," so as to vest a gift in alternative in lieu of cumulative events. *Hawes v. Hawes*, 1 Ves. Sen. 13; *Jackson v. Jackson*, 1 Ves. Sen. 216; *Stapleton v. Stapleton*, 2 Sim. N. S. 212, with which compare *Malmesbury v. Malmesbury*, 31 B. 407; *Maynard v. Wright*, 26 B. 285.

"And" changed into "or" upon the context.

Upon the same principle the Court has changed the word fourth into fifth, where it was clear upon the construction of the whole will that the testator intended to refer to the

"Fourth" changed into "Fifth."

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fifth and not to the fourth schedule. *Hart v. Tulk*, 2 D. M. & G. 800. See *Surtees v. Hopkinson*, 4 Eq. 98; *Smith v. Crabtree*, 6 Ch. D. 591; *In re Northen's Estate*; *Salt v. Pym*, 28 Ch. D. 153.

SUPPLYING WORDS.

With regard to supplying words in a will the rule seems to be that where the will as it stands is clearly inconsistent, so that the choice lies between rejecting some portion of it or supplying some word, while at the same time the latter course will make the will consistent, the Court will be justified in making the necessary addition. See *Hope v. Potter*, 3 K. & J. 206; *In re Morony*, 1 L. R. Ir. 483.

Limitation to  
the second and  
other sons  
supplied.

Thus, in a devise to A. for life, remainder "to the first son of A. severally and successively in tail male," the devise will be construed as to the first and other sons of A. *Parker v. Tootal*, 11 H. L. 143. See *Newburgh v. Newburgh*, Lord St. Leonards' Law of Property, 367.

Under a bequest in trust for the testator's widow for her life in trust for his children, followed by powers of maintenance and advancement after the widow's death, with an ultimate gift over after her death in default of children attaining vested interests, the Court supplied the words "and after her death" after the words "for her life." *Greenwood v. Greenwood*, 5 Ch. D. 954.

Limitation to  
daughters  
supplied in a  
marriage  
settlement.

So, too, where there was a limitation in a settlement to the children of the marriage who being a son or sons should attain twenty-one years; and if there should be but one such child, the whole to be in trust for such one child, his *or her* executors and administrators, and there were powers of applying the presumptive share of every such child for his *or her* maintenance until his *or her* share should become vested, the Court held daughters to be included in the gifts. *In re Daniel's Settlement Trusts*, 1 Ch. D. 375.

So, where property was given upon trust for all the children of A. "who being a son or sons shall live to attain twenty-one years or being a daughter or daughters shall marry under that age," it was held that the gift to daughters vested on their

attaining twenty-one. *Re Hunt; Davies v. Hetherington*, 62 L. T. 758.

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In a somewhat similar case, where there were limitations to daughters for life with remainder to their children, and the limitation to the children of one daughter was omitted, it was supplied upon the general intention of the will. *In re Redfern; Redfern v. Bryning*, 6 Ch. D. 133; see *Re Smith; Bashford v. Chaplin*, 45 L. T. 246; *Mellor v. Daintree*, 33 Ch. D. 198.

So when there is a gift to A. in tail, and if he die over, the words "without issue" will be supplied in the gift over to satisfy the implied contingency. *Anon.*, 1 And. 93.

The words  
"without  
issue" sup-  
plied, so as  
not to divest  
a prior estate  
tail.

And in a similar case, where there were devises to several in tail and the interest of one of the tenants in tail was given over to another, "if he died living Alice," the words "without issue" were supplied, there being a gift over of the whole upon death of all the tenants in tail without issue. *Spalding v. Spalding*, Cro. Car. 185.

The extreme limit to which the Court will go in supplying words in such cases is probably marked by *Abbott v. Middleton*, 7 H. L. 68. The gift there was of personalty to the testator's wife for life and then to his son for life with remainder to the son's children and "in case of my son dying before his mother" over. The son died, leaving a child, and the House of Lords held (diss. Lords Cranworth and Wensleydale) that the words "without children" must be supplied in the gift over, so as to leave the child of A. in possession of the property.

*Abbott v.  
Middleton.*

However, if the testator expressly distinguishes death in the lifetime of a tenant for life from death without issue; if, for instance, the gift over is either in the event of death before the tenant in tail or in the event of death without issue at any time, the gift over must be literally construed. *Eastwood v. Lockwood*, L. R. 3 Eq. 487.

Where a testator bequeathed the remainder of his property "and any other property of which I may die possessed, and I nominate my son my executor," it was held that the residue was undisposed of. *Driver v. Driver*, 43 L. J. Ch. 279.

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UNCERTAINTY.

If it is impossible to ascertain the subject-matter or the objects of a gift, it will be void for uncertainty. See *Asten v. Asten*, (1894) 3 Ch. 260.

A bequest of indefinite amount is void.

Thus, a gift of some of my linen, not saying how much, or of a handsome gratuity, is void. *Peck v. Halsey*, 2 P. W. 387; *Jubber v. Jubber*, 9 Sim. 508. See *Jones d. Henry v. Hancock*, 4 Dow, 145.

And a gift to the "children of the deceased son (named Bamber) of my father's sister," where there were three deceased sons all named Bamber, is void. *In re Stephenson; Donaldson v. Bamber*, (1897) 1 Ch. 75, where *Hare v. Cartridge*, 13 Sim. 165, was disapproved. See also *Smithwick v. Hayden*, 19 L. R. Ir. 490; *Powell v. Davies*, 1 B. 532.

If, though the gift is of an uncertain amount, the testator supplies a measure of the bequest, the Court will ascertain how much ought to be expended. On this principle, a direction to the testator's son who was residuary legatee to take care and provide for his daughter (*a*); a gift of reasonable remuneration to an executor for his trouble (*b*); a gift to each of the testator's daughters of a house and garden, which house is to be built at the expense of my executors (*c*); and a gift of portions to be determined by the testator's wife and executors (*d*), have been held effectual. *Broad v. Beran*, 1 Russ. 511, n.; compare *Abraham v. Alman*, ib. 509 (*a*); *Jackson v. Hamilton*, 3 J. & Lat. 702; see *Buckley v. Buckley*, 19 L. R. Ir. 544 (*b*); *Edwardes v. Jones*, 35 B. 474 (*c*); *In re Conn; Conn v. Burns*, (1898) 1 Ir. 337 (*d*); see also *Magistrates of Dundee v. Morris*, 3 Macq. 134; 6 W. R. 556.

Gift of a sum not exceeding a certain amount.

A gift of 50*l.* or 100*l.*, or a sum not exceeding a certain amount, will be construed in favour of the legatee as a gift of the larger sum. *Seale v. Seale*, 1 P. W. 290; *Thompson v. Thompson*, 1 Coll. 395; *Cope v. Wilmot*, 1 Coll. 396, n.; *Gough v. Bult*, 16 Sim. 45.

Gift of the rest of a fund when the rest cannot be ascertained.

Upon similar principles, the gift of the rest of a fund, if the rest cannot be ascertained, is void; as in a devise of such houses as she shall select to A. and the others to B., where

A. dies before the testator. *Boyce v. Boyce*, 16 Sim. 476 ;  
*Jerningham v. Herbert*, 4 Russ. 888.

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For cases in which the objects of the gift were held to be so uncertain that the gift failed, see *Buckley v. Buckley*, 19 L. R. Ir. 544 ; *Smithwick v. Hayden*, 19 L. R. Ir. 490.

## CHAPTER XLIX.

## SATISFACTION—ADEMPTION—HOTCHPOT.

## SATISFACTION.

I. *Cases of Double Portions.***Chap. XLIX.**

Satisfaction  
of portions  
by legacies.

WHEN a father or a person *in loco parentis* has covenanted to pay a portion to a child and afterwards gives a legacy of the same or a larger amount to that child, the legacy is *primâ facie* a satisfaction of the portion, and if the legacy is of smaller amount it is a satisfaction *pro tanto*. The rule does not apply in the case of a mother. *Warren v. Warren*, 1 B. C. C. 305; 1 Cox, 41; *In re Ashton*; *Ingram v. Papillon*, (1897) 2 Ch. 574; *revd. on a different point*, (1898) 1 Ch. 142.

Doctrine  
applies where  
portions  
charged on  
property  
of parent.

The doctrine is not limited to cases of covenant by a father creating a personal liability; it applies also where the father charges property of his own with payment of portions for his children, and afterwards by will or otherwise provides portions for them. *Dawson v. Duke of Cleveland*, West. t. Hard. 106; *In re Battersby*, 19 L. R. Ir. 359.

Declarations by the testator are admissible to rebut the presumption against double portions. *In re Tussaud's Estate*, 9 Ch. D. 363.

Satisfaction  
and ademption  
distinguished.

On the other hand, when there is a gift by will to a child, and the testator afterwards in his lifetime gives the child a sum of money, the bequest is adeemed *pro tanto*.

The difference between the two cases is, that in the former case the portion which the testator has covenanted to pay can only be satisfied by the bequest with the consent of the objects of the covenant; in the latter case the gift by will is revocable

and the testator may substitute for it any form of gift Chap. XLIX. he pleases.

Again, in the former case the question whether the gift by will was intended to be a satisfaction of the covenant is a question of testamentary intention; in the latter the question is as to the effect of an act subsequent to the will, and not as to any intention manifested by the will itself.

Lastly, in cases of satisfaction, election must always arise; in cases of ademption it never can.

It follows that the presumption that a gift by will is intended to be a satisfaction of a prior covenant to pay a portion is more easily rebutted than the similar presumption in the case of ademption.

The fact that the objects of the gift by will are not the same as the objects of the covenant, is a stronger argument against satisfaction than against ademption, as the testator cannot be supposed to have wished to do by his will what it was out of his power to do, though, on the other hand, the argument is inconclusive, since the bequest by will may be intended as a satisfaction with regard to some of the objects of the covenant, leaving such of them as take nothing under the will to their rights under the covenant. See *In re Tussaud's Estate*, 9 Ch. D. 363.

Thus, a covenant to settle a certain share upon a son for life and then upon trusts for the benefit of his wife and children, is satisfied as regards the son by a bequest to him absolutely. *McCarogher v. Whieldon*, 3 Eq. 236; see *Bennett v. Houldsworth*, 6 Ch. D. 671.

Covenant to settle for life satisfied by absolute bequest.

So, too, a direct bequest to grandchildren is, as regards the grandchildren, a satisfaction of a covenant to settle a sum upon a daughter and her husband for their lives and the life of the survivor, remainder to their children as they should appoint, and in default of appointment to the children equally. *Campbell v. Campbell*, L. R. 1 Eq. 383.

Covenant to settle in remainder satisfied by immediate bequest.

The fact that legacies to the testator's widow are declared to be in lieu of her claim under the settlement will not rebut the presumption against double portions in the case of legacies to children without any such declaration. *Ackworth v. Ackworth*,

Legacies in lieu of claims under the settlement.

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Satisfaction  
rebutted by  
the difference  
between the  
subject-  
matter of the  
covenant and  
bequest.

cited 3 Ves. 527; 1 B. C. C. 307, n.; *Moulson v. Moulson*, 1 B. C. C. 83; see, too, *Finch v. Finch*, 1 Ves. Jun. 584, where the legacy was expressed to be for a portion.

The presumption of satisfaction may be rebutted by the difference in the thing given by the will and covenanted to be settled.

a. Thus, a devise of land is no satisfaction of a covenant to pay money, unless the lands are expressly estimated by the testator in money. *Goodfellow v. Burchett*, 2 Vern. 298; *Bengough v. Walker*, 15 Ves. 507; see *In re Lawes*; *Lawes v. Lawes*, 20 Ch. D. 81; *In re Vickers*; *Vickers v. Vickers*, 37 Ch. D. 525.

Portion  
satisfied by  
gift of  
residue.

But the fact that the gift by will is of a share of residue will not prevent the gift being a satisfaction of a portion. *Lady Thynne v. Earl of Glengall*, 2 H. L. 131.

Contingent  
legacy and  
vested portion.

b. A contingent legacy is no satisfaction of a vested portion. *Bellasis v. Uthwait*, 1 Atk. 426; *Hanbury v. Hanbury*, 2 B. C. C. 352; *Pierce v. Locke*, 3 Ir. Ch. 205, 215.

Differences  
between the  
covenant and  
the will  
insufficient to  
rebut satis-  
faction.

The presumption of satisfaction will not be rebutted by slight differences between the covenant and the will; as, for instance, differences in the mode of payment, the covenant being to pay on the widow's death, the will within three months of her death (a); or by the fact that the covenant provides for children dying before their portions are payable, and the will does not (b); or that the covenant gives a power to husband and wife jointly, while the will does not (c); or that the covenant provides for children by a particular marriage, while the will extends to all children (d); or that the will imposes a restraint upon anticipation or gives a remainder to children in fee instead of in tail (e); or that the will gives the wife the first life estate, whereas the covenant gives it to the husband (f); or that the husband's life interest is by the will made determinable on bankruptcy or alienation which by the covenant it is not (g); or by the omission from the will of a life interest to the husband who took the second life interest under the covenant (h). *Sparkes v. Cator*, 3 Ves. 530; *Copley v. Copley*, 1 P. W. 146 (a); *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516 (b); *Lady Thynne v. Earl of Glengall*, 2 H. L. 131; *Russell v. St. Aubyn*, 2 Ch. D. 398;



*Romaine v. Onslow*, 24 W. R. 899 (c); *Lady Thynne v. Earl of Glengall*, *supra*; *Russell v. St. Aubyn*, *supra* (d); *Weall v. Rice*, 2 R. & M. 251 (e); *Russell v. St. Aubyn*, *supra*; *Romaine v. Onslow*, 24 W. R. 899 (f); *Russell v. St. Aubyn*, *supra* (g); *Mayd v. Field*, 3 Ch. D. 587 (h). Chap. XLIX.

But a legacy to a daughter for life for her separate use and after her decease, in case her husband should be living, for such persons exclusive of her husband as she should appoint, and in case he should die in her lifetime to her appointees, is not a satisfaction of a covenant to settle on trust to pay a part to the daughter for pin-money and the rest to the husband for life, and if the daughter survive him to her for life, remainder to the children of the marriage as she shall appoint. *Lord Chichester v. Coventry*, L. R. 2 H. L. 71; see *Lewis v. Lewis*, I. R. 11 Eq. 110, 340.

What amount of difference is sufficient to rebut satisfaction.

Nor is a legacy to a daughter for life to her separate use without power of anticipation with remainder to her children, a satisfaction of a covenant to settle upon such trusts as the daughter should with the consent of trustees appoint, and subject thereto for the daughter and her husband successively for life, remainder for the children and in default of children for the husband absolutely. *In re Tussaud's Estate*, 9 Ch. D. 363.

It seems that a direction in the will to pay debts, or debts and legacies, would not alone rebut the presumption of satisfaction, though great stress has been laid upon it, and, coupled with other circumstances, it will have that effect. *Lord Chichester v. Coventry*, L. R. 2 H. L. 71; *Paget v. Grenfell*, 6 Eq. 7; *Bennett v. Houldsworth*, 6 Ch. D. 671.

Direction to pay debts.

And where a testator on the marriage of his second son covenanted to pay him 2,000*l.* a year for life and to charge the annuity on his real estate, and then by will, after giving legacies to the second son which, when invested, would produce more than the annuity, devised his real estate in strict settlement "subject to the charges and incumbrances thereon," it was held that the presumption of satisfaction was not rebutted, although at the testator's death the estates were subject to one mortgage only in addition to the annuity.

Chap. XLIX. *Montagu v. Earl of Sandwich*, 32 Ch. D. 525; see *Lethbridge v. Thurlow*, 15 B. 334.

Covenant in the nature of a debt.

If the portion covenanted to be paid is in the nature of a debt due to the husband or the trustees of the settlement, the presumption of satisfaction is more easily rebutted.

Thus, in *Hall v. Hill*, 1 D. & War. 94, a legacy to the daughter was held to be no satisfaction of a bond to the husband on the marriage of the daughter. See, too, *Lord Chichester v. Corentry*, *supra*.

No satisfaction where portions come from different sources,

No case of satisfaction arises where the property subsequently given is not the property of the person liable under the covenant.

For instance, an appointment by A. of a jointure under a power given by the will of B. is not a satisfaction of a covenant by A. to leave an annuity. *Bannatyne v. Ferguson*, (1896) 1 Ir. 149; see *Lord Walpole v. Lord Conway*, Barn. Ch. 153, 156; *Sir W. Darie's Case*, 5 Vin. Ab. 292, pl. 38.

nor as between a share of settled fund and subsequent advance.

Conversely, when a father has vested property in trustees upon trust for his children a subsequent settlement upon a child cannot be taken to be a satisfaction of the share of that child under the earlier settlement, unless there is evidence that it was intended to be so taken. *Douglas v. Willes*, 7 Ha. 318, p. 328; *Samuel v. Ward*, 22 B. 347; *Noblett v. Litchfield*, 7 Ir. Ch. 575.

Whether share satisfied enures for benefit of other children.

There may, however, be an intention expressed that the property settled by the father is to be taken in satisfaction of the child's interest under the earlier settlement. In such a case the further question arises, does the satisfaction enure for the benefit of the other children entitled under the earlier settlement, or is A. to be considered as the purchaser of the satisfied child's share under the earlier settlement.

In the absence of any intention expressed or to be gathered from the surrounding circumstances, the satisfaction enures for the benefit of the other children entitled under the first settlement. *Folkes v. Western*, 9 Ves. 456; *Brownlow v. Earl of Meath*, 2 D. & Wal. 674; 2 Ir. Eq. 383; *Lee v. Head*, 1 K. & J. 620; *Earl of Bradford v. Earl of Romney*, 31 L. J. Ch. 497.

But there may be circumstances sufficient to show that the father intended to become the purchaser of the share of the

child who is satisfied. *Noel v. Lady Walsingham*, 2 S. & St. Chap. XLIX. 99; *Ford v. Tynte*, 2 H. & M. 324.

## II. Cases of Breach of Trust by Parent.

There are cases in which, where a father became indebted to his children because he had received trust funds to which they were entitled, and afterwards made a settlement on the marriage of a child of a sum larger than the child's share of the trust fund, the settlement has been deemed to satisfy the debt (*a*). The presumption of satisfaction may, however, be rebutted by the facts of the case (*b*). *Wood v. Bryant*, 2 Atk. 521; *Seed v. Bradford*, 1 Ves. Sen. 500; *Chave v. Farrant*, 18 Ves. 8; *Plunkett v. Lewis*, 3 Ha. 316; *Bensusan v. Nehemias*, 20 L. J. Ch. 536 (*a*); *Crichton v. Crichton*, (1896) 1 Ch. 870 (*b*).

Parent receiving trust money belonging to child.

## III. Satisfaction of Covenants by Performance.

Apart from the presumption against double portions, questions have often arisen whether, where there has been a covenant to make some provision by will or otherwise, a subsequent provision was intended to be a performance and has in fact performed the covenant.

A covenant to settle an estate or to leave or pay at the covenantor's death a sum of money or a share of residue is performed by allowing the estate or sum or share of residue to come to the covenantee under the intestacy of the covenantor. *Wilcocks v. Wilcocks*, 2 Vern. 558; *Blandy v. Whitmore*, 2 Vern. 709; 1 P. W. 324; *Lee v. D'Aranda*, 1 Ves. Sen. 1; 3 Atk. 419; *Goldsmid v. Goldsmid*, 1 Sw. 211; *Garthshore v. Chalie*, 10 Ves. 1.

Covenant to settle or leave satisfied by intestacy.

If less than the share covenanted to be left comes to the covenantee under the intestacy, the share so coming must be taken in part performance of the covenant. *Garthshore v. Chalie*, 10 Ves. 1; see *Lechmere v. Earl of Carlisle*, 3 P. W. 211, p. 227.

And a covenant to appoint a share of a fund is satisfied by allowing that share to pass to the covenantee in default of appointment. *Thacker v. Key*, 8 Eq. 408.

Covenant to appoint.

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Covenant to  
leave legacy  
creates debt.

A covenant to leave a legacy of fixed amount creates a debt, and is not satisfied by a gift of the legacy if there are not sufficient assets out of which to pay it. *Eyre v. Monro*, 3 K. & J. 305; *Graham v. Wickham*, 1 D. J. & S. 474.

Covenant to  
leave residuc.

But a covenant to leave the covenantee all the property or a share of the property of the covenantor does not create a debt. *A.-G. v. Murray*, 20 L. R. Ir. 124.

The effect of such a covenant is to leave the covenantor free to dispose of his property in his lifetime as he thinks fit so long as he does not dispose of it in fraud of the covenant. The covenantee is entitled to have the covenant specifically enforced, and he will take subject to payment of the funeral and testamentary expenses and debts of the covenantor. *Logan v. Wienholt*, 1 Cl. & F. 690; 7 Bl. N. S. 1; *Jones v. Martin*, 3 Anst. 882; 5 Ves. 266, n.; *Coverdale v. Eastwood*, 15 Eq. 121; *Jerris v. Wolferstan*, 18 Eq. 18.

For other cases of performance of covenants see *Bethell v. Abraham*, 3 Ch. D. 590, n.; 22 W. R. 745; *In re Brookman's Trust*, 5 Ch. 182; *In re Fickus*; *Farina v. Fickus*, (1900) 1 Ch. 331.

Covenant  
to leave  
discharged  
by death of  
covenantee.

A covenant to give a sum of money by deed or will is discharged if the covenantee dies before the testator. *Jones v. How*, 7 Ha. 267; see *In re Brookman's Trust*, 5 Ch. 182.

#### IV. Satisfaction of Debts.

Legacy of  
equal or  
greater  
amount is a  
satisfaction of  
a debt.

The doctrine of satisfaction also applies to a legacy to a creditor. In such a case the legacy, if of equal or greater amount, is *primâ facie* considered a satisfaction of the debt. *Talbot v. Shrewsbury*, Prec. Ch. 394; *Fowler v. Fowler*, 3 P. W. 353; *Atkinson v. Littlewood*, 18 Eq. 595.

The general rule has, however, been so often disapproved of, and has been held to be excluded by such slight indications of intention, that it is of small practical importance.

1. As to what debts may be satisfied by legacies:—

The debt  
must exist  
at the date  
of the will.

a. The debt to be satisfied must be a debt existing at the date of the will. *Cranmer's Case*, 2 Salk. 508; *Thomas v. Bennett*, 2 P. W. 343; *Plunkett v. Lewis*, 3 Ha. 330.

If the testator afterwards pays the debt, the legacy is gone. *In re Fletcher*; *Gillings v. Fletcher*, 38 Ch. D. 373.

*b.* The testator must have been certain at the date of the will that a debt was due and to whom it was due, and therefore a mere liability on a current account, or on a negotiable instrument, such as a bill of exchange, will not be satisfied by a legacy. *Rawlins v. Powel*, 1 P. W. 297; *Carr v. Eastabrooke*, 3 Ves. 561; *Buckley v. Buckley*, 19 L. R. Ir. 544. Chap. XLIX.

The debt must be certain.

But the fact that the debt is liable to decrease makes no difference. *Edmunds v. Low*, 3 K. & J. 318.

2. As to what legacies will not be considered to satisfy debts :—

*a.* A legacy of smaller amount is no satisfaction of a debt. *Cranmer's Case*, 2 Salk. 508; *Atkinson v. Webb*, 2 Vern. 478; *Prec. Ch.* 236; *Eastwood v. Vinke*, 2 P. W. 614; *Gee v. Liddell*, 35 B. 621; see *Richardson v. Elphinstone*, 2 Ves. Jun. 463; *Reade v. Reade*, 9 L. R. Ir. 409; *Coates v. Coates*, (1898) 1 Ir. 258. Legacy of smaller amount is no satisfaction of a debt.

*b.* Nor is a gift of residue. *Barrett v. Beckford*, 1 Ves. Sen. 519; *In re Keogh's Estate*, 23 L. R. Ir. 257. Gift of residue,

*c.* Nor is a gift of a contingent legacy. *Tolson v. Collins*, 4 Ves. 482; *Mathews v. Mathews*, 2 Ves. Sen. 635. of a contingent legacy.

3. Satisfaction is also rebutted by the difference in the nature of the legacy and the debt.

*a.* As where the debt is by bond and the testator devises land. *Eastwood v. Vinke*, 2 P. W. 614; *Richardson v. Elphinstone*, 2 Ves. Jun. 463; *Coates v. Coates*, (1898) 1 Ir. 258. Debt by bond is not satisfied by a devise of land.

*b.* If the legacy is less advantageous than the debt; if, for instance, the legacy is payable in six months, or no time is fixed for its payment, so that it would not in the ordinary course be payable till the end of a year, and the debt is payable at an earlier date: *Haynes v. Mico*, 1 B. C. C. 129; *Dereze v. Pontet*, 1 Cox, 188; *Adams v. Lavender*, M'Cl. & Y. 41; *In re Horlock*; *Calham v. Smith*, (1895) 1 Ch. 516; or the legacy is payable half-yearly, the debt quarterly: *Atkinson v. Webb*, 2 Vern. 478; *Prec. Ch.* 236; if the debt is secured, the legacy not: *Wood v. Wood*, 7 B. 183; or the debt is a first charge, the legacy not: *Hales v. Darell*, 3 B. 325; if the debt is to the separate use, the legacy not: *Bartlett v. Gillard*, 3 Russ. 149; *Rowe v. Rowe*, 2 De G. & S. 294; *Fourdrin v. Gowdey*, 3 M. & K. 409; but see *Atkinson v. Littlewood*, 18 Eq. 595. Debt not satisfied when the legacy is less advantageous.

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And an annuity given by will, and therefore not payable till a year after the testator's death, is not a satisfaction of a covenant to pay an annuity by half-yearly payments. *In re Dowse*; *Dowse v. Glass*, 50 L. J. Ch. 285.

c. Sums held on trust for a tenant for life are not satisfied by legacies of those amounts to the tenants for life absolutely. *Fairer v. Park*, 3 Ch. D. 309.

Legacy in lieu of dower.

d. If the legacy is expressed to be given in satisfaction of dower, the debt is not satisfied. *Pinchin v. Simms*, 30 B. 119; *Glover v. Hartcup*, 34 B. 74.

Debt due to one set of trustees, legacy to another.

e. The fact that the debt is due to one set of trustees, and the legacy is given to another, is a circumstance to be considered, but apparently not alone decisive. *Pinchin v. Simms*, 30 B. 119; *Smith v. Smith*, 3 Giff. 121; and see *Atkinson v. Littlewood*, 18 Eq. 595.

Direction to pay debts and legacies.

4. The presumption will be rebutted by a direction to pay "debts and legacies." *Chancey's Case*, 1 P. W. 408; *Lethbridge v. Thurlow*, 15 B. 334; *Richardson v. Greese*, 3 Atk. 65; *Field v. Mostin*, 2 Dick. 543; *Jefferies v. Michell*, 20 B. 15; *Hassell v. Hawkins*, 2 Dr. 469.

But not if the direction is in the will, and a debtor, whose debt is incurred subsequent to the will, receives a legacy by a codicil. *Gaynon v. Wood*, 1 P. W. 409, n.

Covenant to pay sum to wife after husband's death satisfied by legacy.

A covenant entered into on marriage to pay the intended wife a sum of money within six months after the husband's death, has been held satisfied by a legacy of that amount payable within three months after the husband's death, though there was a direction in the will to pay debts and legacies. *Wathen v. Smith*, 4 Mad. 325; criticised in *Cole v. Willard*, 25 B. 568.

Direction to pay debts.

5. A direction to pay "debts" only rebuts the presumption of satisfaction. *Horlock v. Wiggins*; *Wiggins v. Horlock*, 39 Ch. D. 142; *In re Huish*; *Bradshaw v. Huish*, 43 Ch. D. 260, not following *Edmunds v. Low*, 3 K. & J. 318.

Debt and will contemporaneous.

6. Where the document creating the debt and the will are nearly contemporaneous, the presumption of satisfaction is much more easily rebutted. *Horlock v. Wiggins*, 39 Ch. D. 142.

## ADEMPTION OF PORTIONS.

Ademption is based upon the presumption that a father or person *in loco parentis* does not intend to provide double portions for his children. If, therefore, he gives a child a legacy or a share of residue by will, and subsequently provides a portion for the child, the gift by will is adeemed either wholly or in part according as the subsequent gift is equal to or exceeds, or is less than the portion provided by the will. *Pym v. Lockyer*, 5 M. & Cr. 29; *Montefiore v. Guedalla*, 1 D. F. & J. 98; *In re Lacon*; *Lacon v. Lacon*, (1891) 2 Ch. 482.

Principle of ademption.

The doctrine has been applied where a father made an appointment by will under a special power and subsequently by deed appointed to one of the appointees under the will. *Montague v. Montague*, 15 B. 565; see *In re Ashton*; *Ingram v. Papillon*, (1897) 2 Ch. 574; (1898) 1 Ch. 142.

Appointed funds.

The doctrine is only applied against a child in favour of other children and not in favour of a widow or stranger. *Meinertzen v. Walters*, 7 Ch. 670.

Doctrine not applied in favour of strangers.

The doctrine does not apply to a devise of land. *Darys v. Boucher*, 3 Y. & C. Ex. 397.

Devise of land.

Inasmuch as ademption arises from acts subsequent to the will, the will itself throws no light upon the intention of the subsequent act.

Ademption not question of construction.

Therefore, where the subsequent portion is given through the medium of a covenant to pay a sum of money, the fact that the will directs the testator's debts to be paid out of his residuary estate is of no importance upon the question of ademption. *Cooper v. Macdonald*, 16 Eq. 258.

A legacy or share of residue given to a child by will is presumed to be a portion. The principal contest in the cases has therefore been as to whether the subsequent gift was in the nature of a portion or not.

What is a portion.

The question is one of fact to be considered upon all the circumstances of the case, and evidence is admissible to rebut the presumption. *Kirk v. Eddowes*, 3 Ha. 509; *In re Lacon*; *Lacon v. Lacon*, (1891) 2 Ch. 482.

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Portion need  
not be given  
on marriage.

The simplest case of a portion is a gift upon marriage, but it is not necessary that the gift should be made on marriage or any other special occasion. *Leighton v. Leighton*, 18 Eq. 458.

A settlement  
causes  
ademption.

A settlement made upon a legatee adeems a gift by will, though the trusts of the will and settlement are different.

Thus, an absolute gift by will is adeemed by a settlement of property to be held on the usual trusts of a marriage settlement. *Lord Durham v. Wharton*, 3 Cl. & F. 146; *Stevenson v. Masson*, 17 Eq. 78; *Edgeworth v. Johnston*, I. R. 11 Eq. 326.

And a sum given to a daughter's husband in consideration of his making a settlement upon her or for the purposes of the marriage—for instance, to furnish a house—is an ademption of a legacy to the daughter. *Lord Durham v. Wharton*, 3 Cl. & F. 146; *Nerin v. Drysdale*, 4 Eq. 517.

Legacy for  
life with  
remainder  
adeemed  
by gift.

Conversely, a legacy to a child for life with remainder to her children will be adeemed by a gift to the child absolutely (a); and also by a settlement containing the usual trusts of a marriage settlement, even though the settlor may reserve to himself an ultimate interest in default of issue of the marriage (b). *Kirk v. Eddowes*, 3 Ha. 509 (a); *Cooper v. Macdonald*, 16 Eq. 258 (b).

Gift over  
adeemed  
as well.

A legacy of 10,000*l.* by a person *in loco parentis*, followed by a gift over to a charity if the legatee should have no children, is adeemed both as regards the legatee and the charity by a transfer of 10,000*l.* Consols to the legatee in the testator's lifetime. *Twining v. Powell*, 2 Coll. 262.

Annuity  
may be a  
portion.

An annuity may or not be a portion. If it is in the nature of a permanent provision for a child it will be (a). On the other hand, if it is only a temporary provision in the nature of maintenance it will not (b). *Kircudbright v. Kircudbright*, 8 Ves. 51; *Dawson v. Dawson*, 4 Eq. 504 (a); *Edwards v. Freeman*, 2 P. W. 436; *Watson v. Watson*, 33 B. 574; *Hatfield v. Minet*, 8 Ch. D. 136 (b).

Dissimilarity  
between  
property  
willed and  
given.

Dissimilarity between the property given by will and that subsequently given will not prevent ademption.

Thus, a legacy or share of residue may be adeemed by a settlement of Consols and of stock of a railway company (a),



or by a share in a business (*b*). *Watson v. Watson*, 33 B. 574 ; **Chap. XLIX.**  
*Leighton v. Leighton*, 18 Eq. 459 (*a*) ; *In re Vickers* ; *Vickers v. Vickers*, 37 Ch. D. 525 ; *In re Lawes* ; *Lawes v. Lawes*, 20 Ch. D. 81, not following *Holmes v. Holmes*, 1 B. C. C. 555 (*b*).

But a legacy has been held not adeemed by a contingent portion, such as a bond conditioned for payment of a sum if the legatee should marry in the testator's life with his consent or survive him. *Spinks v. Robins*, 2 Atk. 491 ; see *Crompton v. Sale*, 2 P. W. 553. Contingent portion.

Payments to a daughter on marriage of 600*l.* or 800*l.* (*a*), or 1,000*l.* stock (*b*), or to her husband of 400*l.* for furnishing (*c*), have been held to adeem legacies to the daughter ; on the other hand, small occasional sums and a small allowance of 60*l.* a year (*d*), and 100*l.* for an outfit, and a gift of 400*l.*, to the husband of a daughter (*e*), have been held not to adeem a legacy to a daughter. *Schofield v. Heap*, 27 B. 93 (*a*) ; *Watson v. Watson*, 33 B. 574 (*b*) ; *Nerin v. Drysdale*, 4 Eq. 517 (*c*) ; *Schofield v. Heap*, *supra* ; *Watson v. Watson*, *supra* (*d*) ; *Ravenscroft v. Jones*, 32 B. 669 ; 4 D. J. & S. 224 (*e*). What payments will and will not adeem.

The question of "advancement by portion" also arises under the Statute of Distributions. Under that Act it has been held that the premium stamp and expenses upon a son being articulated to a solicitor, the price of a commission and outfit, the admission fee at an Inn of Court, the price of plant and machinery for starting a business, and money given to pay an officer's debts of honour are, but that the fee of a special pleader, the price of outfit and passage money for an officer going to India, payment of an officer's debts, and contributions to a clergyman's housekeeping expenses are not advances. *Boyd v. Boyd*, 4 Eq. 305 ; *Taylor v. Taylor*, 20 Eq. 155. Advances under the statute.

There is no ademption if the persons taking the gift by will and the portion are different. Difference in beneficiaries.

Therefore, a gift to a daughter's husband on the marriage, though expressed to be a portion, will not adeem a gift by will to the daughter absolutely or to her for life, with remainder to her children. *Ravenscroft v. Jones*, 32 B. 669 ; 4 D. J. & S. 224 ; *Cooper v. Macdonald*, 16 Eq. 258.

And if there is a substitutional gift to the issue of a child

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How property  
valued.

An adeemed  
legacy is not  
revived by a  
codicil.

Advances  
made before  
the date of  
the will.

Legacies  
given for a  
purpose are  
adeemed if  
the testator  
satisfies the  
purpose.

Questions  
arising on  
hotchpot  
clauses.

dying before the testator, the gift to the issue is not adeemed by a loan made to a parent who predeceased the testator. *Rose v. Rogers*, 39 L. J. Ch. 791.

For the purpose of ademption the property afterwards given is to be valued as at the time of gift less estate duty, if any, and an annuity is to be valued as at the same time. *Watson v. Watson*, 33 B. 574; *Kircudbright v. Kircudbright*, 8 Ves. 51; see *Hatfield v. Minet*, 8 Ch. D. 136; *In re Beddington*; *Micholls v. Samuel*, (1900) 1 Ch. 771.

An adeemed legacy is not revived by a codicil republishing the will. *Powys v. Mansfield*, 3 M. & Cr. 376; see *Rarenscroft v. Jones*, 4 D. J. & S. 224.

An advance made before the date of the will, will not operate as an ademption in the absence of a special agreement that it shall. *Upton v. Prince*, Ca. t. Talb. 71; *In re Peacock's Estate*, 14 Eq. 236; *Taylor v. Cartwright*, 41 L. J. Ch. 529.

#### ADEPTION OF LEGACY GIVEN FOR A PURPOSE.

Where a legacy is given for a particular purpose or in satisfaction of a moral obligation, whether to a stranger or not, and the testator afterwards in his lifetime satisfies the purpose or obligation, the legacy is adeemed. *Debeze v. Mann*, 2 B. C. C. 519; *Monck v. Monck*, 1 Ba. & Be. 298; *Powys v. Mansfield*, 3 M. & Cr. 359; *In re Pollock*; *Pollock v. Worrall*, 28 Ch. D. 552; *Griffith v. Bourke*, 21 L. R. Ir. 92.

The rule applies though the legacy is not stated to be given for a particular purpose, but is by law presumed to be so given; for instance, in satisfaction of a debt. *In re Fletcher*; *Gillings v. Fletcher*, 38 Ch. D. 373.

A legacy of 200*l.* to the testator's wife to be paid within ten days after his decease is not adeemed by a gift of 200*l.* shortly before the death, made in order that the wife might have the immediate control of money. *Pankhurst v. Howell*, 6 Ch. 136.

#### HOTCHPOT CLAUSES.

In many cases the instrument contains a direction that advances made by the testator are to be brought into hotchpot. Numerous questions have arisen on such clauses.

A direction that if a parent should during his life advance or pay any sum for the benefit of his children the sums are to be brought into account, does not include a share taken under the father's intestacy nor benefits given by his will. *Twisden v. Twisden*, 9 Ves. 413; *Cooper v. Cooper*, 8 Ch. 813.

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Share in intestacy or under will not advance in lifetime.

The proposition supported by *Leake v. Leake*, 10 Ves. 476; *Golding v. Haverfield*, 13 Pr. 593; M'C. 345; *Fazakerley v. Gillibrand*, 6 Sim. 591, that a gift by will is an advancement in the life of the testator is no longer law.

But the direction may be so framed as to include gifts by will, for instance, if the reference is to gifts made by a father "in his lifetime or by his will" or "in his life or at his death," or if the event provided for is if the father should have bestowed or given portions to his children on their marriage, "or otherwise provided for them." *Papillon v. Papillon*, 11 Sim. 642; *Rickman v. Morgan*, 1 B. C. C. 63; 2 B. C. C. 393; *Leake v. Leake*, 10 Ves. 477.

Intention to include gift by will.

And a direction that if parents should in their lifetime "settle, give, or advance" unto, for or upon their children, has been held to include a gift by will. *Onslow v. Michell*, 18 Ves. 490; see *Golding v. Haverfield*, 13 Pr. 593; M'C. 345.

The words advance or pay in a hotchpot clause are not appropriate to real or leasehold property, and under such words a leasehold house given to a son and real estate devised to children need not be brought into account. *Douglas v. Willes*, 7 Ha. 318; *Cooper v. Cooper*, 8 Ch. 813.

Words applicable to money.

Benefits coming to the children under a post-nuptial settlement of the mother's property, or under a deed of family arrangement to which father and mother are parties, are not *primâ facie* advances by the father. *Douglas v. Willes*, 7 Ha. 318; *Cooper v. Cooper*, 8 Ch. 813.

What is not an advance by the father.

A sum paid by the testator under a guarantee of the son's account is an advance to him; but purchase-money payable by a son to his father which does not become due till after the testator's death, is not. If the testator proves for a debt in the son's bankruptcy so much as remains unpaid must nevertheless be brought into account. *Auster v. Powell*, 1 D. J. & S.

What are advances.

**Chap. XLIX.** 99; *In re Whitehouse*; *Whitehouse v. Edwards*, 37 Ch. D. 693; see *Silverside v. Silverside*, 25 B. 340.

**Gift by way of marriage.** 1,000*l.* given to a husband on his marriage with the testator's daughter in exchange for his snuff-box, was held not given by way of marriage or advancement. *M'Clure v. Evans*, 29 B. 422.

**Direction to make up income.** Where the income of a legatee was directed to be made up to a certain amount, the legatee to certify her income from all sources, it was held that the legatee was not bound to bring into account an annuity given by a subsequent testator with a direction that it was not to be taken into account, but was to be a clear beneficial addition. *In re Hedges' Trust Estate*, 18 Eq. 419.

**How income ascertained.** As to how the income is to be ascertained in such a case, see *Lady Bateman v. Faber*, 48 W. R. 165.

A direction to deduct a sum from the share of a legatee as an equivalent for an estate given to him fails if the estate is not purchased. *Nugee v. Chapman*, 29 B. 288.

**Statute-barred debts.** Under a direction to deduct advances made to a legatee by her brothers or sisters, debts owing from the legatee to her brothers and sisters may be deducted though barred by the statute. *Poole v. Poole*, 7 Ch. 17.

And where a share of residue is given to a person and a debt due from him is to be deducted, the whole debt and not merely what can legally be recovered is to be deducted. *Mathews v. Kelle*, 4 Eq. 467; 3 Ch. 691; see *In re Jolly*; *Gathercole v. Norfolk*, (1900) 1 Ch. 292.

Where the testator directed his sons to pay or account for debts owing to him before they should receive their shares, and the share of a son was settled by a codicil, it was held that a debt due from the son was to be brought into account for the purpose of division, but not for the purpose of increasing the amount to be settled. *White v. Turner*, 25 B. 505.

**When hotchpot clause ceases to operate.** Where the residue was given to the testator's children by a first and second wife to vest at twenty-one, with a direction that if the children by the first wife should become entitled to another fund they should bring it into hotchpot, it was held that the hotchpot clause ceased to operate when the eldest child attained twenty-one. *Stares v. Penton*, 4 Eq. 40.

Where the testator directed his children, who were his residuary legatees, to bring advances into hotchpot, and a share given to one of the children was revoked and lapsed, it was held that the hotchpot clause applied to the lapsed share, and that the son, whose share was revoked, could not claim as next of kin, without bringing advances into hotchpot, but not so as to increase the widow's share. *Stewart v. Stewart*, 15 Ch. D. 539.

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Lapsed share.

Under a clause directing a child to bring advances into hotchpot, an advance to a child cannot be brought against the issue of the child, who take the share in remainder or by substitution. *Silverside v. Silverside*, 25 B. 340; *Hewitt v. Jardine*, 14 Eq. 58.

Direction as to child does not affect issue.

A direction to deduct advances from shares of residue does not affect a residuary legatee's right to a general legacy given by the will. *Smith v. Crabtree*, 6 Ch. D. 591.

Under the ordinary hotchpot clause with reference to appointed shares, life and reversionary interests must be brought into account. *Eales v. Drake*, 1 Ch. D. 217.

Direction as to appointed shares.

Where an estate was to be divisible equally if below and unequally if above a certain amount, it was held that a sum which the testator covenanted to settle on a daughter and which she had to bring into hotchpot, must be brought into account in ascertaining the value of the estate. *Fox v. Fox*, 11 Eq. 142.

Where the testator gave his residue to his son and daughter equally, and directed any sum which he had agreed to give on the marriage of a child should be taken in satisfaction of the share, and he covenanted to settle 10,000*l.* on the son's marriage with ultimate reversion to himself on failure of issue, which happened, it was held that the son's estate was entitled to the settled 10,000*l.*, subject to his widow's life estate under the settlement, that the daughter must receive 10,000*l.*, and that the residue of the estate was divisible equally between the son and daughter. *Wheeler v. Humphreys*, (1898) A. C. 506.

Effect of direction that settled sum be taken as part of share.

As a general rule, where several funds are settled by one instrument and there is a hotchpot clause, an appointee of one fund cannot claim an unappointed share of the other funds

Several funds and one hotchpot clause.

**Chap. XLIX.** without bringing the fund appointed to him into hotchpot, unless there is a clear indication of intention that the funds are to be treated as separate. *In re Marquis of Bristol ; Earl Grey v. Grey*, (1897) 1 Ch. 946 ; *Hutchinson v. Tottenham*, (1898) 1 Ir. 408 ; (1899) 1 Ir. 344.

And where a fund is settled by a will with a hotchpot clause, and then other funds are settled by the same will upon the same trusts by reference, there is to be *primâ facie* one hotchpot clause applicable to the three funds, and not a separate hotchpot clause applicable to each fund. *Re Perkins ; Perkins v. Bagot*, 67 L. T. 748.

On the other hand, where by a will funds are directed to be held upon the same or similar trusts as funds settled by a settlement, a separate hotchpot clause must be applied to the fund settled by reference. *Montague v. Montague*, 15 B. 565 ; *Re North ; Meates v. Bishop*, 76 L. T. 186.

Directions  
as to how  
advances to be  
ascertained.

In some cases the testator himself states what he has advanced or gives directions how advances are to be ascertained, for instance, by reference to an account book.

Advances  
recited to  
have been  
made.

Where the testator recited that he had paid 5,000*l.* for his son-in-law, and directed that if the son-in-law should not before the testator's death have repaid 5,000*l.* at least, that sum should be taken in part payment of a legacy to the son-in-law, and 5,000*l.* had not in fact been paid for the son-in-law, it was held that the legacy was to be reduced only by the amount actually paid. *In re Taylor's Estate ; Tomlin v. Underhay*, 22 Ch. D. 495.

In other cases legatees have been held bound by recitals as to the amount of advances and by entries in ledgers referred to by the testator. *In re Aird's Estate ; Aird v. Quick*, 12 Ch. D. 291 ; *Quihampton v. Going*, 24 W. R. 917 ; *In re Wood ; Ward v. Wood*, 32 Ch. D. 517 ; see *Burroues v. Lord Clonbrock*, 27 L. R. Ir. 538.

Entries  
subsequent to  
date of will.

But entries made subsequent to the date of the will cannot be incorporated into it, and made binding on the legatee, though they are admissible as evidence that advances were made by the testator. *Smith v. Conder*, 9 Ch. D. 170 ; *Whateley v. Spooner*, 3 K. & J. 542 ; see *Re Coyte ; Coyte v. Coyte*, 56 L. T. 510.

Where advances are directed to be brought into account evidence is not admissible to show that the testator, some time after an advance, had written off a portion of the advance as a gift. *Smith v. Conder*, 9 Ch. D. 170. Chap. XLIX.

Where a testator directed advances appearing in a specified book to be taken into account, and subsequently destroyed the book, it was held that no advances, whether made before or after the will, were to be taken into account. *Re Coyte, supra*.

In the case of direct gifts where advances made by the testator are directed to be deducted from a legatee's share, interest at 4 per cent. on such advances must be computed from the testator's death. *Andrewes v. George*, 3 Sim. 393; *Hilton v. Hilton*, 14 Eq. 468; *Field v. Seward*, 5 Ch. D. 538; see *Poole v. Poole*, 7 Ch. 17. Interest on advances.

If the testator directs the advances to be deducted with interest at 5 per cent., interest at that rate will be computed down to the testator's death and at 4 per cent. from that date. *Stewart v. Stewart*, 15 Ch. D. 539.

If the time of distribution is postponed advances carry interest only from the time of distribution. *In re Rees*; *Rees v. George*, 17 Ch. D. 701; *In re Dallmeyer*; *Dallmeyer v. Dallmeyer*, (1896) 1 Ch. 372; *In re Lambert*; *Middleton v. Moore*, (1897) 2 Ch. 169.

Where a testator had advanced a son 2,000*l.* at interest and gave his residue to his widow for life with remainder to his children, a direction that advances to the children were to be taken in part satisfaction of their shares was held not to operate till the widow's death, so that the son was compelled to pay his interest on the 2,000*l.* to the widow. *Limpus v. Arnold*, 15 Q. B. D. 300.

In the case of appointments under powers hotchpot clauses will not be implied.

Thus, an appointment in favour of an object "as and for her share" does not exclude that object from sharing in the unappointed part, though the sum left unappointed is such as would give all the objects equal shares. *Wilson v. Piggott*, 2 Ves. Jun. 351; *Wombucell v. Hanrott*, 14 B. 143; *Walmesley v. Vaughan*, 1 De G. & J. 114. Appointment "as and for her share."

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Share in lieu  
of claims.

And it seems a direction that the appointed share is in lieu of all claims and demands of the donee to or for her original share in the trust fund will not exclude her from the unappointed part. *Foster v. Cautley*, 6 D. M. & G. 55.

On the other hand, an appointment to one object, coupled with a declaration that the donee of the power wishes the fund equally divided, may amount to an appointment of the rest of the fund to the other objects. *Fortescue v. Gregor*, 5 Ves. 553.

And a direction for accruer which can only have a meaning on the supposition that the fund has been appointed in favour of other objects, may also amount to an appointment. *Foster v. Cautley*, 6 D. M. & G. 55.

In the case of a deed, if the appointee is a party and a share is appointed to him in lieu of his share in the fund, the appointee cannot share in the unappointed part. *Clune v. Appjohn*, 17 Ir. Ch. 25; *Armstrong v. Lynn*, I. R. 9 Eq. 186.

Under a gift to several persons as A. shall appoint with a gift in default of appointment to them equally, a direction to bring advances made by the testator into hotchpot applies only to the unappointed portion of the fund. *Brocklehurst v. Flint*, 16 B. 100.



## CHAPTER L.

## INTERESTS UNDISPOSED OF.

## LAPSE.

PORTIONS of a testator's property may be undisposed of, either because the disposition attempted by him has failed, or because no disposition has been attempted.

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A devise or legacy, whether it be of a debt due to the testator or not, lapses by the death of the devisee or legatee before the testator, or even before the date of the will. *Elliot v. Davenport*, 1 P. W. 83 ; 2 Vern. 581 ; *Maybank v. Brooks*, 1 B. C. C. 84.

Doctrine of lapse.

Confirmation by codicil of a will containing a legacy to a legatee, her executors and administrators, where the legatee has died since the date of the will, does not prevent a lapse or give the legacy to the executors of the legatee. *Hutcheson v. Hammond*, 3 B. C. C. 127 ; *Maybank v. Brooks*, 1 B. C. C. 84.

Confirmation by codicil.

Where the gift is to several named persons as tenants in common, the shares of any who die before the testator lapse. *Page v. Page*, 2 P. W. 489 ; *Peat v. Chapman*, 1 Ves. Sen. 542.

Gift to tenants in common by name.

Possibly, if one of the named persons is shown on the face of the will to be dead at the date of the will, the fund would be divisible among the others. *Clarke v. Clemmans*, 36 L. J. Ch. 171.

Person dead at date of will.

So a devise by A. to the uses of B.'s will can only take effect in favour of those devisees of B. who survive A. *Culsha v. Cherse*, 7 Ha. 245.

The doctrine of lapse applies to a power of appointment exercised by will, and the appointee must survive the donee of the power in order to take. *Duke of Marlborough v. Lord*

Power of appointment

Chap. L. *Godolphin*, 2 Ves. Sen. 61 ; *Freeland v. Pearson*, L. R. 3 Eq. 658 ; *In re Susanni's Trusts*, 47 L. J. Ch. 65.

An appointment by will in accordance with a covenant is subject to the ordinary rule as to lapse. *Re Brookman's Trust*, 5 Ch. 182 ; see *Jerris v. Wolferstan*, 18 Eq. 18.

Power to  
appoint, death  
of some of the  
objects.

Where a testator by his will creates a power to appoint to a class, it has been said that the death of any member of the class in the testator's lifetime destroys the power *pro tanto*. See *Reade v. Reade*, 5 Ves. 744.

But the death of any members of the class after the testator's death in the lifetime of the donee of the power does not affect the power, which may be exercised as to the whole in favour of the survivors. There is no distinction for this purpose between a power to appoint to a class and a power to appoint to named individuals, with a gift to them nominatim in default of appointment. *Boyle v. Bishop of Peterborough*, 1 Ves. Jun. 299 ; *Ricketts v. Loftus*, 4 Y. & C. Ex. 519 ; *Paske v. Haselfoot*, 38 B. 125 ; *In re Ware* ; *Cumberlege v. Cumberlege-Ware*, 45 Ch. D. 269.

Gift to  
debtor.

A gift to a debtor of his debt, though the debt be given to him, his executors and administrators, with a direction to hand over the securities to him, is in effect a legacy, and lapses by the death of the debtor in the testator's lifetime. It is immaterial whether the debt is given or forgiven. *Toplis v. Baker*, 2 Cox, 118 ; *Elliott v. Davenport*, 1 P. W. 88 ; 2 Vern. 521 ; *Maitland v. Adair*, 3 Ves. 231 ; *Izon v. Butler*, 2 Pr. 34.

Possibly a general direction to hand over the security to be cancelled might release the debt, whether the debtor survives the testator or not. *Sibthorp v. Mozom*, 3 Atk. 580 ; 1 Ves. Sen. 49 ; see *South v. Williams*, 12 Sim. 566.

Legacies  
to creditors  
whose debts  
are barred.

With regard to legacies to creditors of the testator in discharge of debts which have been released by the operation of the bankruptcy laws or by lapse of time :—

1. A gift to the official assignee in bankruptcy in trust to pay debts will not fail as regards creditors who die in the testator's lifetime, though the debts are barred by the Statute of Limitations as well as discharged by a certificate

in bankruptcy. *In re Sowerby's Trusts*, 2 K. & J. 630; 7 D. M. & G. 429; *Turner v. Martin*, 5 W. R. 277; 3 Jur. N. S. 397.

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2. Nor will the gift of a sum to be divided among creditors, though the debts may be barred by the Statute of Limitations, if they have not been released by the creditors. *Williamson v. Naylor*, 3 Y. & C. Ex. 208; *Phillips v. Phillips*, 3 Ha. 281.

3. On the other hand, if the gift is not through the medium of the assignee and the debts have been released or extinguished, the gift is mere bounty, and will fail as regards the creditors dying in the testator's lifetime: *Coppin v. Coppin*, 2 P. W. 295; but the authority of this case is very doubtful. And see *Golds v. Greenfield*, 2 Sm. & G. 476.

A declaration that a legacy shall not lapse is not sufficient to prevent lapse, unless it is clear that it is to go to the estate of the legatee in the event of his death. *Pickering v. Stamford*, 3 Ves. 498; *Johnson v. Johnson*, 4 B. 318; *Underwood v. Wing*, 4 D. M. & G. 663; see *Wilder's Trusts*, 27 B. 418.

Effect of a declaration against lapse.

But a gift to A. and his executors or administrators with a direction that the legacy is not to lapse has been held sufficient. *Sibley v. Cook*, 2 Atk. 572.

On the other hand, in the case of a gift in similar terms, a direction that the legacy was to vest from the date of the will was held insufficient to prevent lapse. *Broune v. Hope*, 14 Eq. 343.

Where a testator gives his residue to A. and B. and in case of their decease to their executors, and A. predeceased the testator, having given her residue to him, it was held that the moiety given to A. lapsed. *In re Valdez's Trusts*, 40 Ch. D. 159.

The interest of persons taking in default of appointment does not fail by the death of the donee of the power before the testator. *Hardwick v. Thurston*, 4 Russ. 380; *Edwards v. Saloway*, 2 Ph. 625; *Nichols v. Haviland*, 1 K. & J. 504; *Kellett v. Kellett*, 1 R. 5 Eq. 298.

Interests of persons to take in default of appointment.

The interests of those taking in remainder do not fail by the death of the tenant for life before the testator. But if an absolute interest is given and the testator then proceeds

Interests of persons in remainder not affected by

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lapse of the  
life interest.

Absolute  
interest  
settled.

to settle the share, the question is whether what is settled is a share to which the legatee has become entitled by surviving the testator or whether the settlement is of the share which the legatee would have taken if he or she had survived. In the former case the gift fails if the legatee dies before the testator, in the latter case it does not. *In re Speakman ; Unsworth v. Speakman*, 4 Ch. D. 620; *Stewart v. Jones*, 3 De G. & J. 532; *In re Roberts ; Tarleton v. Bruton*, 27 Ch. D. 346; 30 Ch. D. 234; *In re Pinhorn ; Moreton v. Hughes*, (1894) 2 Ch. 276; perhaps *Baker v. Hanbury*, 3 Russ. 340.

Whether a  
gift to A. or  
his executors  
will lapse.

It is clear that a gift to A. or his executors for the benefit of his estate after a life interest, or where the payment is postponed, will fail by the death of A. before the testator: *Bone v. Cook*, M'Clel. 168; 13 Pr. 332; *Corbyn v. French*, 4 Ves. 418; *Tidwell v. Ariel*, 3 Mad. 403, where heirs was read as executors and administrators. *Leach v. Leach*, 35 B. 185.

This rule, however, does not apply where the gift is to A. or his heirs after a life interest, where heirs means next of kin, who take beneficially and not as mere representatives. *In re Porter's Trusts*, 4 K. & J. 188.

But it would seem a direct gift to A. or his executors, if executors is construed in its literal sense, would not lapse by A.'s death before the testator. See *Marwell v. Maxwell*, 1 R. 2 Eq. 478; see, however, *Aspinall v. Duckworth*, 35 B. 307; and *ante*, p. 316.

Charges will  
not fail by the  
death of the  
devisee  
subject to the  
charge.

If there is a gift to A. charged with a sum payable to B., the legacy to B. does not lapse by the death of A. before the testator. *Wigg v. Wigg*, 1 Atk. 382; *Hills v. Wirley*, 2 Atk. 605; *Oke v. Heath*, 1 Ves. Sen. 134.

But the legacy would fail if the gift to A. is adeemed or revoked. *Cowper v. Mantell*, 22 B. 223.

And where land was devised to a creditor on condition that he should release his debt, and the testator declared that the debt should not be paid out of residue, the debt was held charged on the land, though the creditor predeceased the testator. *In re Kirk ; Kirk v. Kirk*, 21 Ch. D. 431.

Now, by sect. 32 of the Wills Act, a devise of an estate tail will not lapse if there are at the death of the testator any issue inheritable under the entail.

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Effects of ss. 32  
and 33 of the  
Wills Act on  
the doctrine  
of lapse.

And, by sect. 33, a gift of real or personal property to a child, or other issue of the testator, will not lapse if any issue of the devisee or legatee survive the testator.

The section applies to a gift to a child dead at the date of the will. *Wisden v. Wisden*, 2 Sm. & G. 396.

The issue surviving the testator need not be living at the death of the devisee or legatee. *In bonis Parker*, 1 Sw. & Tr. 523.

In such a case the property bequeathed belongs to the legatee as if he had survived the testator, and passes by his will. *Johnson v. Johnson*, 3 Ha. 157; *In bonis Parker*, 1 Sw. & Tr. 523; *Re Mason's Will*, 34 B. 494.

And estate duty is payable on the death of both father and son. *In re Scott*, (1900) 1 Q. B. 372. Estate duty.

If the devisee dies intestate her husband is entitled to an estate by the curtesy. *Eager v. Furnivall*, 17 Ch. D. 115.

If the legatee devises to the testator there is a lapse, and the heir-at-law and next of kin of the legatee are entitled. *In re Hensler*; *Jones v. Hensler*, 19 Ch. D. 612.

Property preserved from lapse by this section is not within a covenant to settle property coming to the legatee during coverture. *Pearce v. Graham*, 11 W. R. 415; 32 L. J. Ch. 359. Covenant to settle.

Where the testator directed a daughter's share to be settled if she survived him, and she predeceased him leaving issue, it was held that the direction to settle applied to her share. *In re Hone's Trusts*, 22 Ch. D. 663.

Sect. 33 applies to gifts under general powers of appointment, though there is a gift over in default of appointment. *Eccles v. Cheyne*, 2 K. & J. 676.

It does not apply to special powers, nor to cases where before the Act there would have been no lapse; as, for instance, gifts to a class. *Griffiths v. Gale*, 12 Sim. 354; *Freeland v. Pearson*, L. R. 3 Eq. 658; *Olney v. Bates*, 3 Dr. 319; *Browne v. Hammond*, Johns. 210; *Holyland v. Lewin*, 26 Ch. D. 266; *In re Sir E. Harvey's Estate*; *Harvey v. Gillow*, (1893) 1 Ch. 567.

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These sections apply to the interest of a person dying before the date of the will, but after the Act came into operation, but not to a person dying before the Act came into operation. *Winter v. Winter*, 5 Ha. 306; *Mower v. Orr*, 7 Ha. 473; *Wild v. Reynolds*, 5 N. of C. 1.

Doctrine of lapse in the case of gifts to a class.

In the case of gifts to a class as tenants in common, the shares of members of the class dying before the testator do not lapse but go to the other members of the class.

A gift to the children of A. as tenants in common, to be vested at twenty-one, is in effect a gift to the children who attain twenty-one. *Re Colley's Trusts*, L. R. 1 Eq. 496.

A direction that the shares of any members of the class who die before the testator, leaving issue, shall not lapse, will not have the effect of causing the shares of those who die before the testator without issue to lapse. *Aspinall v. Duckworth*, 35 B. 307.

Gift to a class incapable of increase.

It is immaterial that the class may be so determined as to be incapable of increase; as, for instance, if the class is "my nephew and nieces living at the time of my husband's decease," as tenants in common. *Dimond v. Bostock*, 10 Ch. 358; *Lee v. Pain*, 4 Ha. 201, 250; *Leigh v. Leigh*, 17 B. 605.

No person incapable at the testator's death of taking is a member of the class.

And no person incapacitated from taking at the death of the testator is looked upon as a member of the class, so that, for instance, the share of a member of the class incapacitated from taking because he witnessed the will, goes to the other members. *Young v. Davies*, 2 Dr. & Sm. 167; *Fell v. Biddulph*, L. R. 10 C. P. 701; *In re Colman & Jarrom*, 4 Ch. D. 165.

Appointment to object not capable of taking.

This doctrine does not apply to cases where property is appointed under a power to objects and non-objects. In such cases the objects of the power only take the shares they would have taken if the whole appointment had been valid and the rest goes as in default. *Harvey v. Stracey*, 1 Dr. 137; *In re Farncombe's Trusts*, 9 Ch. D. 652.

But where by will under a power property is appointed to objects of the power, and by a codicil which does not purport to revoke the will, part of the same property is appointed to non-objects, the original appointment takes effect over the

whole property. *Duguid v. Fraser*, 31 Ch. D. 449; *In re Wells' Trusts*; *Hardisty v. Wells*, 42 Ch. D. 646. Chap. L.

When there is a gift to a class the revocation of the gift to one of the members of the class does not cause a lapse, but the whole goes to the other members of the class. *Shaw v. MacMahon*, 4 D. & War. 481; *M'Kay v. M'Kay*, (1900) 1 Ir. 213. Revocation of the share of a member of the class.

And a gift of residue to several persons and to A. if living, or to several persons and to such of the children of A. as are living at the date of the will, does not lapse as to the share of A. or the children of A., if A. is dead or there are no children living at the date of the will. *Re Hornby*, 7 W. R. 729; *In re Spiller*; *Spiller v. Madge*, 18 Ch. D. 614; see *Sanders v. Ashford*, 28 B. 609.

A gift of aliquot shares to several named persons as tenants in common is not a gift to a class, and the shares of any dying before the testator lapse. *Cresswell v. Cheslyn*, 2 Ed. 128; *Ramsay v. Shelmerdine*, L. R. 1 Eq. 129. Gift of aliquot shares to named persons.

Nor is a gift to a class of persons "before mentioned," the persons having been previously named, a gift to a class. *Re Gibson*, 2 J. & H. 656.

A gift to "the five daughters" of A., or to "my nine children," is not a gift to a class. *In re Smith's Trusts*, 9 Ch. D. 117; *In re Stansfield*, 15 Ch. D. 84.

The result is the same if the gift is to a class the members of which are then named. *Bain v. Lescher*, 11 Sim. 397.

And a gift to my wife's brother and sister and my brothers and sister equally, when the testator had at the date of the will three brothers and one sister, was held a *designatio personarum*, and the shares of two brothers who died before the testator lapsed. *Havergal v. Harrison*, 7 B. 49.

A gift to "my executors herein-named" has been held a gift to a class, the gift being attached to the office and therefore passing wholly to those who survive to perform the office. *Knight v. Gould*, 2 M. & K. 295. Whether a gift to named executors is subject to lapse.

But this is not the case if the gift, though the donees happen to be executors, is not given to them in respect of their office. *Barber v. Barber*, 3 M. & Cr. 688; *Hoare v. Osborne*, 12 W. R. 397.

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Gift to A.  
and class B.

There has been some conflict of opinion as to whether a gift to A. and the children of B. is a gift to a class or not; but the Court of Appeal has now decided that if they are all to take equally such a gift is *prima facie* a gift to a class, and if A. dies before the testator, his share goes to the children of B. *In re Moss; Kingsbury v. Walter*, (1899) 2 Ch. 314; see *M'Kay v. M'Kay*, (1900) 1 Ir. 213. Some of the cases, such as *Re Chaplin's Trust*, 12 W. R. 147<sup>1</sup>; 33 L. J. Ch. 183; *Re Ann Wood's Will*, 31 B. 323; *Drakeford v. Drakeford*, 33 B. 43; *In re Allen; Wilson v. Atter*, 44 L. T. 240; 29 W. R. 480, may be difficult to reconcile with this decision. There was a special context in *Aspinall v. Duckworth*, 35 B. 307; *In re Featherstone's Trusts*, 22 Ch. D. 111; see, too, *Clark v. Phillips*, 17 Jur. 886.

Gift to A., B.,  
C. and other  
children of X.

It had already been decided that a gift to A., B., C., and D. and such other children of the testator as should attain twenty-one, was in effect a gift to a class. *Re Stanhope's Trusts*, 27 B. 201; *In re Jackson; Shiers v. Ashworth*, 25 Ch. D. 162.

A direction to include an individual in the class does not make it the less a class, as in a gift equally to all my children, including W. *Shaw v. MacMahon*, 4 D. & War. 431.

#### RESULTING TRUSTS.

Devise  
subject to a  
charge which  
fails.

When an estate is devised subject to a charge, and the purpose for which the charge is created fails, the charge sinks for the benefit of the devisee. *A.-G. v. Milner*, 3 Atk. 112; *Jackson v. Hurlock*, Amb. 487; 2 Ed. 263; *King v. Denison*, 1 V. & B. 261; *Tucker v. Kayess*, 4 K. & J. 339; *Heptinstall v. Gott*, 2 J. & H. 449.

Where the devise is clearly subject to a charge it makes no difference that the money to be raised by the charge is given to purposes such as a charity, which, if valid, would in all events give it away from the devisee. *Baker v. Hall*, 12 Ves. 497; *Cooke v. Stationers' Company*, 3 M. & K. 262.

Whether the  
devisee takes  
subject to, or  
what remains  
after satisfying  
charge.

But where there is no express charge it must depend upon the general intention whether the particular gift is a charge, or whether the devisee was intended to take only what remains after deducting the particular gift.



1. Thus, if the lands are not expressly charged, but the devisee is directed to pay a certain sum, there has been held to be a resulting trust. *Arnold v. Chapman*, 1 Ves. Sen. 108; *Bland v. Wilkins*, cit. 1 B. C. C. 61.

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Direction to raise a sum which is disposed of in all events.

2. If a sum is directed to be raised, and a full disposition is made of it, for instance, to a charity, in such a way that the disposition, if valid, must in all events give the money away from the devisee of the land, who is to take only from and after the raising the money, there is a resulting trust for the heir upon failure of the particular disposition. *Tregonwell v. Sydenham*, 3 Dow, 194.

Direction to raise a sum which is disposed of in all events.

But if the money to be raised is given for purposes which, though valid, may not take effect, the mere fact that the land is not given till after raising the money will not take the money from the devisee if those purposes fail. *In re Cooper's Trusts*, 23 L. J. Ch. 25; 4 D. M. & G. 757.

And where land was devised for life and in tail after the expiration or other sooner determination of a term of ninety-nine years limited to trustees, of which no trusts were declared, actual enjoyment by the devisee being intended, the devises were held to be subject to the term. *Sidney v. Shelley*, 19 Ves. 352.

Where a testator has by a previous instrument a power to charge real estates and exercises the power by will, the above rules have no application. In such a case, if the disposition made by the will fails, the charge is nevertheless raisable. *Simmons v. Pitt*, 8 Ch. 978.

Distinction between a charge created by the will and by a prior instrument.

Where a testator, after charging his real estate with payment of legacies in aid of his personalty, declares that a legacy shall in certain contingencies sink into the residue of his personal estate, this merely amounts to a direction that it shall sink into the fund out of which it has been provided, and not that it shall be raisable out of the real for the benefit of the personal estate. *Johnson v. Webster*, 4 D. M. & G. 474; *Re Duke of Somerset*; *Thynne v. Seymour*, 55 L. T. 758.

Direction that legacy to sink into residue of personalty.

#### ACCELERATION.

In the case of a devise to a person for life with remainder in fee, where the tenant for life is incapable of taking or is not

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*in rerum naturâ*, the remainder is valid and will be accelerated. Year Book, 9 Henry VI. fo. 24 b; Perkins, sects. 566, 567.

The same rule applies in the case of personalty. *Jull v. Jacobs*, 3 Ch. D. 708; see *In re Clark*; *Clark v. Randall*, 81 Ch. D. 72.

Revocation  
or forfeiture.

The rule applies if the life estate is revoked by the testator or determined by a forfeiture clause. *Lainson v. Lainson*, 18 B. 1; 5 D. M. & G. 754; *Levestaff v. Austin*, 19 B. 591; *Craven v. Brady*, 4 Eq. 209; 4 Ch. 296; *In re Love*; *Green v. Tribe*, 47 L. J. Ch. 783; see *Stephenson v. Stephenson*, 52 L. T. 576.

Acceleration  
altering class  
to take.

The result of an acceleration may be to alter the members of the class whose interest is accelerated. *Re Johnson*; *Danily v. Johnson*, 68 L. T. 20.

No accelera-  
tion while  
class not in  
existence.

There can be no acceleration so long as the persons to take in remainder are not in existence, for instance, if the gift is to A. for life and then to her children and A. has no children. *In re Townsend's Estate*; *Townsend v. Townsend*, 84 Ch. D. 357.

Powers of  
sale and  
charging.

Powers of sale will be accelerated, but not powers to charge. *Truell v. Tysson*, 21 B. 437.

Whether  
there is any  
distinction as  
regards  
acceleration  
between  
appointments  
and devises.

There is no distinction as regards acceleration between appointments and devises: *Craven v. Brady*, *supra*; though if the object of an appointment which is void is to benefit the persons who would take in default of appointment, and a remainder is well appointed, the remainder will not be accelerated. *Crozier v. Crozier*, 3 D. & War. 353.

## WHO ARE ENTITLED TO INTERESTS UNDISPOSED OF.

Intestates'  
Estates Act.

By the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), the real and personal estate of a man who dies intestate after the 1st September, 1890, leaving a widow but no issue, if it does not exceed 500*l.* belongs to the widow. If it does, she is entitled to 500*l.*, for which she is to have a charge on the real and personal estate with interest at 4 per cent. from the death. The provision made by the Act is to be in addition to her rights in the residue of the property after paying the 500*l.*

The widow's 500*l.* is paramount to her dower. *Re Charrière*; *Duret v. Charrière*, 74 L. T. 650; 44 W. R. 539. Chap. L.

The Act does not apply to cases of partial intestacy. *In re Twigg's Estate*; *Twigg v. Black*, (1892) 1 Ch. 579.

The widow may be barred of her right to dower and also of her right under the Statute of Distributions to her share of personalty undisposed of if she accepts a provision made, for instance, by marriage settlement in lieu of her right under an intestacy. The right to dower may be barred by a provision out of personal property, and the right under the statute may be barred by a provision out of realty. It is a question of construction of the instrument making the provision how far it is to extend.

Dower barred  
by provision  
made by  
settlement.

Many of the cases as to dower were before the Dower Act, when the husband could only dispose of his land subject to his wife's dower unless it was barred. Different considerations apply now that the wife's dower only attaches to land of which the husband dies intestate. See *Willis v. Willis*, 34 B. 340.

The expression "thirds" has no definite meaning. It may refer to the widow's right against real estate undisposed of or to her share under the statute, even though the share is a half and not a third. If the provision accepted is to be in lieu of dower and thirds at common law, this tends to show that provision under the statute is not intended to be barred, though even then there may be other words which deprive the words "at common law" of this effect. *Druce v. Denison*, 6 Ves. 385; *Colleton v. Garth*, 6 Sim. 19; *Slatter v. Slatter*, 1 Y. & C. Ex. 28; *Thompson v. Watts*, 2 J. & H. 291; *Gurly v. Gurly*, 8 Cl. & F. 743; *In re Burgess' Trusts*, 11 Ir. Ch. 164; *Coyne v. Duigan*, (1894) 1 Ir. 138.

With regard to dower, it is not necessary that the provision accepted should be expressed to be in lieu of dower; if it is called a jointure it is enough; and even if not called a jointure it may be gathered from the whole instrument that the provision was intended to be in lieu of dower; for instance, if it is recited as made for providing a competent

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jointure and provision by way of maintenance. *Killen v. Campbell*, 10 Ir. Eq. 461; *Pennefather v. Pennefather*, 1 R. 6 Eq. 171; *Dyke v. Rendall*, 2 D. M. & G. 209.

And the provision accepted in lieu of dower may be a mere agreement to make a settlement which is never carried out; the land is, nevertheless, released from dower. *Simpson v. Gutteridge*, 1 Mad. 609; *Cooper v. Cooper*, 6 Ir. Ch. 217; *Pennefather v. Pennefather*, 1 R. 6 Eq. 171.

But a mere annuity settled by the husband on the wife and the ordinary provisions of a marriage settlement do not bar the wife's dower. *Cody v. Cody*, 5 L. R. Ir. 620; *O'Rorke v. O'Rorke*, 17 L. R. Ir. 153; *Lemon v. Marsh*, (1899) 1 Ir. 416.

Provision  
where wife  
an infant  
at time of  
marriage.

As regards provision for a wife by marriage settlement where she is an infant at the time of the marriage, see *Drury v. Drury*, or *Earl of Buckingham v. Drury*, 4 B. C. C. 505, n.; 3 B. P. C. 492, ed. Toml.; *Caruthers v. Caruthers*, 4 B. C. C. 499; *Seaton v. Seaton*, 13 App. C. 61, p. 67.

Effect of  
Dower Act,  
s. 9.

Under the Dower Act (8 & 4 Will. IV. c. 105), s. 9, where a husband devises any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein to or for the benefit of the widow, such widow is not to be entitled to dower out of or in any land of her husband unless a contrary intention is declared by the will.

Under this section a life interest given to the widow in the proceeds of sale of land devised on trust for sale bars her right to dower. *Rowland v. Cuthbertson*, 8 Eq. 466; *In re Thomas*; *Thomas v. Howell*, 34 Ch. D. 166.

And a devise within the section bars the widow's dower out of land of which the husband was tenant in tail. *Cooper v. Cooper*, 6 Ir. Ch. 217.

Effect of  
provision by  
will in lieu  
of rights  
under  
intestacy.

Provisions made by the will itself in satisfaction of the rights of a widow or of rights as heir-at-law or next of kin stand on a different footing.

Directions in the will excluding the heir-at-law from any interest in the testator's property do not prevent him from taking real estate which is not disposed of. It seems to be

immaterial in such a case whether the testator attempts to dispose of the real estate or not. *Norcott v. Gordon*, 14 Sim. 258; *Fitch v. Weber*, 6 Ha. 145.

On the other hand, if there is a gift to one of the next of kin in satisfaction of his share under the statute, it makes a difference whether the will makes a complete disposition or not. If it does, the gift in satisfaction may be considered to be given for the purposes of the dispositions of the will, and not as intended to deprive the next of kin of any interest in what may in the event turn out to be undisposed of (a). But if there is an intestacy on the face of the will, the gift in satisfaction must have been intended to enure for the benefit of the other next of kin (b). *Sympton v. Hutton*, 11 Vin. 185, pl. 16; 3 Ves. 335; *Pickering v. Stamford*, 2 Ves. Jun. 272, 581; 3 Ves. 332, 492; see *Naismith v. Boyes*, (1899) A. C. 495 (a); *Lett v. Randall*, 3 Sm. & G. 83 (b).

There are, however, some authorities not consistent with the proposition supported by *Lett v. Randall*. See *Johnson v. Johnson*, 4 B. 318; *Tavernor v. Grindley*, 32 L. T. 424.

Upon similar principles, a direction that one of the next of kin shall take no share in the testator's property will not prevent him from taking his share under the Statutes of Distribution. *Johnson v. Johnson*, 4 B. 318; *Sykes v. Sykes*, 4 Eq. 200; 3 Ch. 301; see *Ramsay v. Shelmerdine*, L. R. 1 Eq. 129; *Gould v. Gould*, 32 B. 391; *Re Holmes*; *Holmes v. Holmes*, 63 L. T. 383.

A limitation to the next of kin of a married woman, as if she had died unmarried, will not exclude the husband's title as administrator if there are no next of kin. *Hawkins v. Hawkins*, 7 Sim. 178.

On the other hand, a gift to a child of "ten shillings and no more," has been held to bar the child's right as next of kin where no disposition was attempted to be made by the will. *Breton v. Vachell*, 5 B. P. C. 51; 11 Vin. Ab. 185, pl. 16.

But such a clause would probably now be construed as putting the child to his election. *Re Holmes*, *supra*.

And a clause excluding some of the next of kin may be so framed as in effect to amount to a gift to the others. *Bund v.*

Next of kin  
excluded.

Gift to child  
of certain  
property and  
no more.

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*Green*, 12 Ch. D. 819; see *In re Taylor*; *Taylor v. Ley*, 52 L. T. 839.

**Escheat.**

If the testator dies without an heir, lands undisposed of by him in which he has the legal estate pass by escheat to the lord of whom they are held, if he can be ascertained, or if not to the Crown, but they are assets for the payment of the debts of the deceased. *Erans v. Brown*, 5 B. 114; *Viscount Downe v. Morris*, 3 Ha. 394; *Rogers v. Maule*, 1 Y. & C. C. 4; *Thurxton v. A.-G.*, 1 Vern. 340; Co. Litt. 18 b; *May v. Street*, Cro. Eliz. 120; *In re Hyatt*; *Bowles v. Hyatt*, 38 Ch. D. 609, p. 620.

**Intestates' Estates Act, 1884.**

The Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71), enacts that after the 14th August, 1884, "where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament whether devised or not to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest, above-mentioned, were a legal estate in corporeal hereditaments."

**Effect of Act on rent-charge.**

Before the Act, if the owner of a rent-charge died without heirs, the rent-charge merged in the land. Co. Litt. 299 b, n. 261.

Is the effect of the Act, to keep the rent-charge alive for the benefit of the lord of the manor?

**Land devised to trustees.**

Under the Act, where land is devised to trustees on trust for sale and to pay debts but the residue is not disposed of, the residue, in default of an heir, goes to the Crown and not to the trustees. *In re Wood*; *A.-G. v. Anderson*, (1896) 2 Ch. 596.

**Equitable estates on failure of heirs.**

In cases not affected by this Act, if a testator who dies intestate and without an heir has an equitable estate in land, the person in whom the legal estate is vested, whether as trustee or mortgagee, is entitled to the lands. *Burgess v. Wheate*, 1 Ed. 177; *A.-G. v. Sands*, 2 Freem. 129; *Hardres*, 488; *Beale v. Symonds*, 16 B. 406.

**The trustee takes when there is no heir.**

The trustee is beneficially entitled, though the land may be devised on trust for sale. *Walker v. Denne*, 2 Ves. Jun.

170; *Taylor v. Haygarth*, 14 Sim. 8; *Cox v. Parker*, 22 B. 168. Chap. L.

Where lands held by trustees for the testator are devised to other trustees, the latter are entitled upon failure of the trusts if there is no heir of the testator. *Onslow v. Wallis*, 1 Mac. & G. 506.

But the original trustees will be entitled, if the latter trustees are bare trustees having no active duties to perform. *In re Lashmar*; *Moody v. Penfold*, (1891) 1 Ch. 258.

In the case of copyholds the heir of a trustee who has not been admitted is entitled as against the lord. *Gallard v. Hawkins*, 27 Ch. D. 298.

In the case of chattels real and personal the Crown and not the trustee is entitled on failure of next of kin. *Cradock v. Owen*, 2 Sm. & G. 241; *Powell v. Merritt*, 1 ib. 381; *Read v. Stedman*, 26 B. 495; *Johnstone v. Hamilton*, 11 Jur. N. S. 777.

The Crown takes in default of next of kin.

If next of kin afterwards establish a title, the Crown cannot be charged with interest on what it has received while in possession of the property, except where it administers to the estate of the deceased person. *In re Gosman*, 17 Ch. D. 771.

Estates *pur autre vie* descend either to the heir-at-law or executor, according to the limitations contained in the latest instrument affecting the estate. *Croker v. Brady*, 4 L. R. Ir. 653; *In re Michell*; *Moore v. Moore*, (1892) 2 Ch. 87.

Estates *pur autre vie*.

Under sect. 6 of the Wills Act, estates *pur autre vie*, of a freehold nature, given to a man and his heirs, pass, if undisposed of, to the heir subject to debts. If there is no heir they pass to the executor as part of the personal estate, whether the interest is legal or equitable. *Plunket v. Reilly*, 2 Ir. Ch. 585; *Reynolds v. Wright*, 25 B. 100; 2 D. F. & J. 590.

If there is no special occupant, the executor or administrator is entitled.

If land is demised for lives to A. and his heirs, and A. by his will devises the estate to B. without words of limitation, it has been held in Ireland that it passes on B.'s death intestate to B.'s heir-at-law. *Wall v. Byrne*, 2 J. & L. 118; *Blake v. Jones*, 1 H. & Br. 227, n.; *In re King*; *King v. King*, (1898) 1 Ir. 91; (1899) 1 Ir. 30.

Devise without words of limitation of estate *pur autre vie* limited to A. and his heirs.

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The rule in England appears to be different, and in such a case, as no special occupant is named, the estate goes to the executor or administrator. *Doe d. Lewis v. Lewis*, 9 M. & W. 662. *Philpotts v. James*, 3 Doug. 425, is explained in (1897) 1 Ch. 67.

There appears to be no difference on this point between a conveyance by deed and a devise by will, since a conveyance by deed passes the whole interest without words of limitation. *Brenan v. Boyne*, 16 Ir. Ch. 87.

The point only arises where the estate is in its creation granted to A. and his heirs.

In other cases, if no special occupant is named, it goes to the executor or administrator. *In re Sheppard; Sheppard v. Manning*, (1897) 2 Ch. 67.

Thus, if an estate *pur autre vie* is conveyed to A. and his heirs in trust for B., no special occupant being named in the limitation of the equitable estate, it passes to the legal personal representative. *Earl of Mountcashel v. More-Smyth*, (1896) A. C. 158.

Chattel  
interest in  
land undis-  
posed of  
goes to heir  
as personalty.

Land which is undisposed of for a chattel interest passes to the heir, but the heir takes the interest as personalty. *Leret v. Needham*, 2 Vern. 138; *Sewell v. Denny*, 10 B. 315; *Burley v. Eirelyn*, 16 Sim. 290; *Whitehead v. Bennett*, 18 Jur. 140.

## RESIDUE UNDISPOSED OF.

Effect of  
Lord St.  
Leonards'  
Act.

Since Lord St. Leonards' Act (11 Geo. IV. & 1 Will. IV. c. 40), which controls the wills of testators dying after September 1, 1830, the executors take the residue undisposed of for the benefit of the next of kin, unless a contrary intention is expressed in the will, parol evidence not being admissible. *Juler v. Juler*, 29 B. 34; *Love v. Gaze*, 8 B. 472.

Contrary  
intention  
within the  
Act.

Such contrary intention does not sufficiently appear by the mere fact that the testator shows that he conceived himself to have disposed of the residue. *Travers v. Travers*, 14 Eq. 275.

But if the testator appoints three of his children executors without expressly giving them any beneficial interest, and gives reasons why he has not provided by his will for his other children, the executors will take the residue beneficially.



*Harrison v. Harrison*, 2 H. & M. 237; see *Fuge v. Fuge*, Chap. L.  
27 L. R. Ir. 59.

Where a testator, after making several legacies, gave to each of his executors 50*l.* and added, "I will the executors shall apply the overplus, if any, as they think fit," it was held that they took the residue as trustees for the next of kin. *Fenton v. Nerin*, 31 L. R. Ir. 478.

The Act applies only where the executor would otherwise have taken the undisposed residue; it does not therefore apply, where there is an express devise of the residue, whether on trusts which do not exhaust the whole or otherwise. *Saltmarsh v. Barrett*, 22 B. 474; 3 D. F. & J. 279; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *Williams v. Arkle*, L. R. 7 H. L. 606.

The Act only applies where the will contains no gift of the residue.

If there are no next of kin, Lord St. Leonards' Act does not apply, and the executors will take the residue undisposed of, unless a contrary intention is indicated, in which case it will go to the Crown. *Middleton v. Spicer*, 1 B. C. C. 201; *Johnstone v. Hamilton*, 11 Jur. N. S. 777; *Taylor v. Haygarth*, 14 Sim. 8; *In re Knowles*; *Roose v. Chalk*, 28 W. R. 975.

Where there are no next of kin the Act does not apply.

It becomes, therefore, necessary to consider in what cases executors would have been held excluded from the residue undisposed of under the old law.

The title of executors in cases under the old law.

1. They take only such residue as the testator did not intend to dispose of.

*a.* They do not take legacies which have lapsed or are void. *Bennett v. Batchelor*, 3 B. C. C. 28; *A.-G. v. Tomkins*, Amb. 216.

They do not take lapsed or void legacies.

*b.* Nor do they take where the whole is expressly given to them on trusts which are void: *Dacre v. Patrickson*, 1 Dr. & Sm. 182; *Johnstone v. Hamilton*, 11 Jur. N. S. 777; or not exhaustive: *Dawson v. Clarke*, 18 Ves. 247; *Ellcock v. Mapp*, 2 Ph. 793; 3 H. L. 492; or not declared: *Milnes v. Slater*, 8 Ves. 295; *Taylor v. Haygarth*, 14 Sim. 8; *Cradock v. Owen*, 2 Sm. & G. 241; *Read v. Stedman*, 26 B. 495; *Vezey v. Jamson*, 1 S. & St. 69; *Chester v. Chester*, 12 Eq. 444.

Nor residue given on trust

The fact, however, that the executors are made trustees

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for some particular and limited purpose does not affect their title to the residue. *Batteley v. Windle*, 2 B. C. C. 31; *Griffiths v. Hamilton*, 12 Ves. 299; *Pratt v. Sladden*, 14 Ves. 198.

Executors not entitled to the residue when they are treated as trustees.

2. And even when the property is not given to the executors upon trust, if they are appointed to carry out the will, or are treated as undertaking a duty and not receiving a benefit, they take as trustees. *Androcin v. Poilblanc*, 3 Atk. 299; *Braddon v. Farrand*, 4 Russ. 87; *Giraud v. Hanbury*, 3 Mer. 150; *Lord North v. Purdon*, 2 Ves. Sen. 495; *Dillon v. Rilly*, 9 L. R. Ir. 57.

But where the trust is only inferential, evidence in favour of the executors will be admitted. *Gladding v. Yapp*, 5 Mad. 56.

Cases where the testator has not intended to dispose of all his property by his will.

3. And a presumption against the executor's title is raised if the testator shows an intention to dispose of the residue, though he may not actually do so: *Bishop of Cloyne v. Young*, 2 Ves. Sen. 91; *Lord North v. Purdon*, 2 Ves. Sen. 495; *Darers v. Dewes*, 3 P. W. 40; *Mordaunt v. Hussey*, 4 Ves. 117; *Mence v. Mence*, 18 Ves. 348; or if he expresses an intention to dispose of part only of his property by his will: *Urquhart v. King*, 7 Ves. 225; or if the property is directed to go according to law: *Cranley v. Hale*, 14 Ves. 307.

In such cases evidence in support of the executor's title is admissible. *Bishop of Cloyne v. Young*, 2 Ves. Sen. 91; *Nourse v. Finch*, 1 Ves. Jun. 344; 2 Ves. Jun. 78; *In re Bacon's Will*; *Camp v. Coe*, 31 Ch. D. 460.

4. The executor takes as trustee for the next of kin:—

A legacy to a sole executor converts him into a trustee.

a. If there is a legacy to a sole executor, whether general or specific, or whether in possession or reversion, or whether expressed to be for his trouble or not, or whether for life or not, if there is no gift of the remainder. *Nourse v. Finch*, 1 Ves. Jun. 344; 2 Ves. Jun. 78; *Southcot v. Watson*, 3 Atk. 226; *Seley v. Wood*, 10 Ves. 71; *Oldman v. Slater*, 3 Sim. 84; *Rachfield v. Careless*, 2 P. W. 158; *King v. Denison*, 1 V. & B. 260; *Zouch v. Lambert*, 4 B. C. C. 326; *Dick v. Lambert*, 4 Ves. 725.

It makes no difference that the executrix is the testator's

wife or relation, or that legacies are given to the next of kin. *Randall v. Bookey*, 2 Vern. 425; *Dick v. Lambert*, 4 Ves. 725; *Farrington v. Knightley*, 1 P. W. 543; and see note, *ib.*

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If the legacy is given in general words parol evidence is admissible in support of the executor's title. *Clennell v. Lewthwaite*, 2 Ves. Jun. 465, 644; *Langham v. Sanford*, 17 Ves. 485.

But not if it is given to him expressly for his trouble. *Rachfield v. Careless*, 2 P. W. 158.

It seems doubtful whether a contingent reversionary interest would raise a presumption against the executor's title. *Lynn v. Beaver*, T. & R. 63.

What legacies will not convert an executor into a trustee.

A legacy to an executor's wife will not convert him into a trustee for the next of kin. *Wilson v. Ivat*, 2 Ves. Sen. 166; *Fruer v. Bouquet*, 21 B. 33.

In these cases the presumption against the executor's title arises from the difficulty of supposing that the testator would have given him something if he meant him to have all. Therefore, if the express legacy can be accounted for on other grounds, no presumption arises. If, for instance, the legacy is an exception out of a larger gift: *Griffith v. Rogers*, 1 Eq. Ab. 245, pl. 8; *Jones v. Westcomb*, Prec. Ch. 316; and this includes the case of a gift to the executor for life, if there is a gift of the remainder: *Granville v. Beaufort*, 1 P. W. 114; or if the legacy is to an executrix, a married woman, for her separate use. *Newstead v. Johnson*, 2 Atk. 45; 9 Mod. 242.

b. Equal legacies to several executors will also raise a presumption against their title to the residue. *Ommaney v. Butcher*, T. & R. 260; *In re Hudson's Trusts*, 31 W. R. 778; 52 L. J. Ch. 789.

Equal legacies to several executors.

And this presumption, it seems, is not rebutted by the fact that unequal bounty is shown them as regards real estate. *Mackleston v. Brown*, 6 Ves. 52, p. 64.

But legacies to some executors and not to others, or unequal legacies to all, raise no presumption against them, since the intention may be to favour some more than others.

Legacies to some executors and not to others.

**Chap. L.** *Griffiths v. Hamilton*, 12 Ves. 299 ; *Pratt v. Sladden*, 14 Ves. 193 ; *Bowker v. Hunter*, 1 B. C. C. 928 ; *Rawlings v. Jennings*, 13 Ves. 89 ; *Dawson v. Thorne*, 3 Russ. 235 ; *In re Knowles* ; *Roose v. Chalk*, 28 W. R. 975.

Legacy to one of several executors for his trouble.

If, however, a legacy be given to one of several executors expressly for his trouble, they all take as trustees. *White v. Evans*, 4 Ves. 21 ; *Milnes v. Slater*, 8 Ves. 295.

But in such a case parol evidence to support their title would be admitted. *Williams v. Jones*, 10 Ves. 77.

Executors appointed for particular reasons.

5. If it is clear that the executors are appointed not from personal motives, but merely from convenience or because they occupy a particular position, they take as trustees. *Urquhart v. King*, 7 Ves. 224 ; *De Mazar v. Pybus*, 4 Ves. 644 ; *Sadler v. Turner*, 8 Ves. 616.

Evidence in favour of next of kin is not admissible, except to rebut evidence in favour of the executors. *White v. Williams*, 3 V. & B. 72.

## CHAPTER LI.

### ADMINISTRATION.

#### A. PAYMENT OF DEBTS, &c.

##### *Funeral Expenses.*

THE first to be paid out of the assets of the deceased are the funeral expenses, for which the executor is liable if he has assets, though he did not himself order the funeral. *Tugwell v. Heyman*, 3 Camp. 297; *Rogers v. Price*, 3 Y. & J. 28. Chap. LI.  
Funeral expenses.

In case of necessity, a stranger may order the funeral and pay for it out of the assets, without rendering himself liable as executor *de son tort*, and he may recover the expenses from the estate. *Vin. Ab. Executor*, B. a, 24; *Green v. Salmon*, 8 A. & E. 348.

As against creditors the funeral expenses must not be more than is reasonable, having regard to the position of the deceased. *Hancock v. Podmore*, 1 B. & Ad. 260.

In the case of a married woman, the husband is liable for her funeral expenses, but where the funeral expenses are made a charge by her will, or she has an estate of her own which does not go to the husband, he may be recouped the funeral expenses. *Willsher v. Dobie*, 2 K. & J. 647; *In re M'Myn*; *Lightbourn v. M'Myn*, 33 Ch. D. 575. Funeral expenses of married woman.

##### *Costs of Administration.*

After funeral expenses come the costs of administration, and these costs have priority over any other costs directed to be paid out of the estate, for instance, costs of a suit in the Probate Division. *In re Mayhew*; *Rowles v. Mayhew*, 5 Ch. D. 596; *Gillooly v. Plunkett*, 9 L. R. Ir. 324; *In re Price*; *Williams v. Jenkins*, 31 Ch. D. 485. Costs of administration.

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Testators often give directions how costs of administration are to be borne.

Testamentary expenses include costs of action.

It is now settled that a direction to pay testamentary expenses includes the costs of an administration action, except in so far as they have been increased by the administration of the real estate. *Morrell v. Fisher*, 4 D. G. & S. 422; *Miles v. Harrison*, 9 Ch. 816; *Harloe v. Harloe*, 20 Eq. 471; *Penny v. Penny*, 11 Ch. D. 440; *Re Young*; *Young v. Dolman*, 44 L. T. 499; *Patching v. Barnett*, 51 L. J. Ch. 74; *In re Middleton*; *Thompson v. Harris*, 19 Ch. D. 552; *In re Copland*; *Mitchell v. Bain*, 44 W. R. 94; see *In re Roper*; *Taylor v. Bland*, 45 Ch. D. 126.

Executorship expenses.

The term executorship expenses has the same meaning. *Sharp v. Lush*, 10 Ch. D. 468.

Funeral and other expenses.

Costs of an administration suit have been held to be included under "funeral and other expenses" and "legal expenses." *Webb v. De Beauvoisin*, 81 B. 578; *Corentry v. Coventry*, 2 Dr. & Sm. 470.

But the words "debts and costs of proving the will" do not include costs of a suit. *Stringer v. Harper*, 26 B. 585; see *Alsop v. Bell*, 24 B. 451.

Costs of special case.

*Browne v. Groombridge*, 4 Mad. 495, and *Gilbertson v. Gilbertson*, 34 B. 354, where the costs of a special case were held not included in testamentary expenses, and *In re Biel's Estate*, 16 Eq. 577, may be considered overruled. See, too, *Brown v. Burdett*, 53 L. J. Ch. 56.

The plaintiff's costs of an unsuccessful action impeaching the will are not testamentary expenses. *In re Prince*; *Godwin v. Prince*, (1898) 2 Ch. 225.

Testamentary expenses of another.

As to the effect of a direction to pay the testamentary expenses of the testator's widow; see *In re Clemow*; *Yeo v. Clemow*, W. N. 1900, 105.

A fund charged with payment of testamentary expenses need not be retained by the executors for more than a year if no action is apprehended. *In re Cope's Trusts*, 36 L. T. 437.

Personal estate liable for costs.

If no particular fund is appointed by the testator, costs of administration are payable out of the personal estate, except in so far as they have been increased by administration of the realty, which in that case must bear the added costs. *Ripley*

v. *Moysey*, 1 Kee. 578; *Pickford v. Brown*, 2 K. & J. 426; *Jackson v. Pease*, 19 Eq. 96; *In re Middleton*; *Thompson v. Harris*, 19 Ch. D. 552; *In re Towry's Settled Estate*; *Dallas v. Towry*, 41 Ch. D. 64, p. 87; see *In re Price*; *Williams v. Jenkins*, 31 Ch. D. 485. Chap. LI.

The costs of administration include the costs of getting in any part of the real and personal estate which is in a foreign country and the payment of all duties necessary for that purpose. *Peter v. Stirling*, 10 Ch. D. 279; *Re Maurice*; *Brown v. Maurice*, 75 L. T. 415. What costs are included.

Where the residue is composed of the proceeds of sale of realty directed to be converted and of personalty, given together as a mixed fund, costs of administration are payable out of the mixed fund rateably, and a lapsed share will not be applied before shares well disposed of. This is the case though the personalty may not be exonerated for the purpose of paying debts. *Luckcraft v. Pridham*, 48 L. J. Ch. 636. Mixed residue bears costs rateably.

In the case of a fund subject to a power the costs of administration will be borne rateably by appointed and unappointed shares. *Warren v. Postlethwaite*, 2 Coll. 108, 116; *Trollope v. Routledge*, 1 De G. & S. 662; *Moore v. Dixon*, 15 Ch. D. 566. Unappointed fund not first liable.

Probate Duty and the old Estate Duty were payable out of the residuary personalty. *In re Bourne*; *Martin v. Martin*, (1898) 1 Ch. 188. Probate and estate duty.

The heir could not be made liable to pay the Probate Duty. *Shepherd v. Beetham*, 6 Ch. D. 597.

#### *Debts and their Priority.*

After payment of the funeral and testamentary expenses, the debts are payable in the following order of priority:— Priority of debts.

##### I. Debts due to the Crown by record or specialty.

Whoever receives money, knowing or having reason to believe that it is money of the Crown, becomes a debtor to the Crown. *Rex v. Wrangham*, 1 Cr. & J. 408; *Rex v. Ward*, 2 Ex. 301, n.; *Reg. v. Adams*, 2 Ex. 299; *In re West London Commercial Bank*, 38 Ch. D. 364. Crown debts by record or specialty.  
What makes a Crown debtor.

An Education Board having a discretionary power independent of the Government to expend money entrusted to it,

- Chap. LI.** is not in the position of the Crown in respect of such money. *Fox v. Government of Newfoundland*, (1898) A. C. 667.
- Surety paying Crown debt.** A surety who has paid a Crown debt is entitled to the Crown's priority. *In re Lord Churchill*; *Manisty v. Churchill*, 39 Ch. D. 174.
- Debts made preferential by statute.** II. Debts to which priority is given by statute.
1. By the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), which applies to the administration in Chancery of the estate of a person who dies insolvent after the 31st December, 1888 (*In re Heywood*; *Parkington v. Heywood*, (1897) 2 Ch. 598), priority is given to—
    - (a) Parochial and other local rates due and having become due within twelve months before the death, and all assessed taxes, land tax, and income tax assessed on the deceased up to the 5th April before his death, not exceeding one year's assessment;
    - (b) Wages and salaries of clerks and servants for services rendered during four months next before the death, not exceeding 50*l.* (*Ex parte Fox*, 17 Q. B. D. 4);
    - (c) Wages of labourers and workmen not exceeding 25*l.* for time or piecework, in respect of services rendered during two months next before the death, with a provision for the case of wages payable in a lump sum at the end of the year of hiring.
  2. 4 & 5 Will. IV. c. 40, s. 12; 6 & 7 Will. IV. c. 32, s. 4, both now repealed, gave priority to debts owing to Friendly and Building Societies by their officers: *Moors v. Marriott*, 7 Ch. D. 543; and the privilege is preserved as regards Friendly Societies by 59 & 60 Vict. c. 25, s. 35.
  3. The Trustee Savings Bank Act, 1863 (26 & 27 Vict. c. 87), s. 14, gives a similar priority to debts owing to a Savings Bank in respect of sums received by its officers by virtue of their office. *Ex parte Riddell*; *Re Batson*, 3 Mont. D. & D. 80; *Ex parte Fleet*; *In re Jardine*, 4 De G. & S. 52; *In re Williams*; *Jones v. Williams*, 36 Ch. D. 573.
  4. In the case of a person dying while subject to military law a priority is given to certain debts by the Regimental Debts Act, 1893 (56 Vict. c. 5), s. 2.
- Debts due by officers of Friendly and Building Societies.**
- Debts due by officers of Savings Bank.**
- Regimental debts.**



5. The guardians have no preference against the estate of a deceased pauper for expenses of maintenance under sect. 16 of the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 108). *Larier v. Botham & Sons*, (1895) 1 Q. B. 59. •

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Guardians of  
poor.

The effect of sect. 40 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), is to abolish pre-existing priorities given by statute if the estate is administered in bankruptcy, except so far as they are saved by the Act. The priority of a Savings Bank for a debt from its officer is therefore gone in bankruptcy. But it has been held that sect. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), has not imported the bankruptcy rule on this point into the administration of an estate in Chancery. The priority, therefore, of a Savings Bank in such a case remains. *In re Williams*; *Jones v. Williams*, 36 Ch. D. 573; see, however, *In re Leng*; *Tarn v. Emmerson*, (1895) 1 Ch. 652.

Effect of  
Bankruptcy  
Act on  
statutory  
preferences.

III. Judgments against the deceased when the judgment has been registered under 23 & 24 Vict. c. 38, s. 3. *Kemp v. Waddington*, L. R. 1 Q. B. 355.

Registered  
judgments.

It has been held that sect. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), has not imported into the administration of insolvent estates in Chancery the bankruptcy rule that all debts, except as expressly otherwise provided, are to be paid *pari passu*. *Smith v. Morgan*, 5 C. P. D. 397; *In re Maggi*, 20 Ch. D. 545; see, however, *In re Leng*; *Tarn v. Emmerson*, (1895) 1 Ch. 652.

As the law now stands, therefore, the old rules as to priorities still prevail if the estate is not administered in bankruptcy.

A surety who has paid the judgment debt without taking an assignment is in the same position as the judgment creditor. *In re M'Myn*; *Lightbown v. M'Myn*, 33 Ch. D. 575.

Surety paying  
judgment  
debt.

The judgment must be the judgment of a Court of Record, and by 1 & 2 Vict. c. 110, s. 18, all decrees of Courts of Equity and all rules of Courts of common law and all orders in lunacy, whereby any money or any costs, charges, or expenses shall be payable, are to have the effect of judgments.

What  
judgments  
have priority.

The order must be for payment of a definite sum of money to a particular person; therefore, an order for an account and payment of what may be found due (*a*), a chief clerk's certificate

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finding a sum due (*b*), and an order to pay into Court (*c*) give no priority. *Chadwick v. Holt*, 8 D. M. & G. 584 (*a*); *Earl of Mansfield v. Ogle*, 4 De G. & J. 38 (*b*); *Wand v. Docker*, 5 Jur. N. S. 1287 (*c*).

Judgments  
against the  
legal personal  
representative.

IV. Judgments against the legal personal representative for debts of the deceased, whether the judgment is registered or not. *Jennings v. Rigby*, 33 B. 198; *In re Williams' Estate*; *Williams v. Williams*, 15 Eq. 270.

Such a judgment has no priority unless it is actually signed before the date of a judgment for administration of the estate. *Parker v. Bingham*, 33 B. 535; *In re Stubbs' Estate*; *Hanson v. Stubbs*, 8 Ch. D. 154.

Order to  
pay call.

An order against the legal personal representative to pay a call out of the assets of the deceased in a due course of administration is not a judgment which will give priority. *In re Hubback*; *International Marine Hydropathic Company v. Hawes*, 29 Ch. D. 934.

Judgments  
*inter se*.

*Inter se* judgments against the executor have priority according to order of date. *Abbis v. Winter*, 3 Sw. 578, n.; *Morrice v. Bank of England*, 3 Sw. 573; Ca. t. Talb. 212; *Dollond v. Johnson*, 2 Sm. & G. 301.

Recognizances.

V. Statutes and Recognizances.

Statutes are obsolete. A familiar kind of recognizance is the ordinary recognizance of a receiver and manager appointed by the Court, which does not create a Crown debt. See *Seagram v. Tuck*, 18 Ch. D. 296.

Debts by  
specialty and  
simple  
contract.

VI. Debts by specialty (including arrears of rent (*a*)) and simple contract, including judgments against the deceased not registered (*b*); see Hinde-Palmer's Act (32 & 33 Vict. c. 46). *In re Hastings*; *Shirreff v. Hastings*, 6 Ch. D. 610 (*a*); *Van Gheluive v. Nerinckx*, 21 Ch. D. 189 (*b*).

Incumbent's  
dilapidations.

Formerly a debt due from an incumbent's estate for dilapidations was postponed to simple contract debts, but it now ranks with them under the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43). *In re Monk*; *Wayman v. Monk*, 35 Ch. D. 583.

Debt due  
to Crown.

A simple contract debt due to the Crown is not entitled to priority over a specialty debt. The result is that the assets

must be apportioned between specialty and simple contract debts, and the Crown will be paid in priority out of the portion available for simple contract debts. *In re Bentinck; Bentinck v. Bentinck*, (1897) 1 Ch. 673. Chap. LI.

VII. Money of a wife lent to her husband for the purposes of his business. *In re Leng; Tarn v. Emmerson*, (1895) 1 Ch. 652. Money lent to husband.

VIII. Voluntary Bonds and Covenants. *Jones v. Powell*, 1 Eq. Ca. Ab. 84; see *Blount v. Doughty*, 3 Atk. 488; *Dawson v. Kearton*, 3 Sm. & G. 186. Voluntary debts.

The holder of a promissory note or similar instrument given without consideration has no claim upon the estate. *In re Whitaker*, 42 Ch. D. 119.

A voluntary bond assigned for value is entitled to the same priority as if it had originally been given for value. *Payne v. Mortimer*, 4 De G. & J. 447.

IX. Interest on debts not carrying interest payable under Order 55, rule 62. *Garrard v. Lord Dinorben*, 5 Ha. 213. Interest.

#### *Executors' Right to Prefer.*

The legal personal representative may prefer a creditor over other creditors of the same class, and this right has not been affected by Hinde-Palmer's Act. But that Act, which places specialty and simple contract creditors on the same footing, does not enable the executor to pay a simple contract in preference to a specialty debt where the estate is insolvent. *Vibart v. Coles*, 24 Q. B. D. 364; *In re Hankey; Cunliffe Smith v. Hankey*, (1899) 1 Ch. 541; not following *Re Orsmond; Drury v. Orsmond*, 58 L. T. 24. Right to prefer.

In exercise of this right the executor may pay a statute-barred debt unless it has been judicially declared to be barred (a); and he may pay a debt that does not carry interest before a debt that does (b). *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Lewis v. Rumney*, 4 Eq. 451; *Midgley v. Midgley*, (1898) 3 Ch. 282; see *In re Wenham; Hunt v. Wenham*, (1892) 3 Ch. 59 (a); *Turner v. Turner*, 1 J. & W. 44; *Robinson v. Cumming*, 2 Atk. 409, 411; *In re Stevens; Cooke v. Stevens*, (1898) 1 Ch. 162, 174 (b). Statute-barred debts.

He cannot pay a debt which is not enforceable because the

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Statute of Frauds has not been complied with. *In re Rownson*; *Field v. White*, 29 Ch. D. 358.

When right to prefer ceases.

The right to prefer continues until judgment for the administration of the estate, and a receiver will not be appointed merely to interfere with the right. *European Assurance Society v. Radcliffe*, 7 Ch. D. 733; *Philips v. Jones*, 28 Sol. J. 360; *In re Barrett*; *Whitaker v. Barrett*, 43 Ch. D. 71; *In re Wells*; *Molony v. Brooke*, 45 Ch. D. 569; *In re Stevens*; *Cooke v. Stevens*, (1898) 1 Ch. 162, p. 173.

*Executors' Right of Retainer.*

Foundation of right of retainer.

The legal personal representative could be sued by creditors, who would, on recovering judgment, get priority over other creditors of the same degree. But he could not sue himself and so acquire priority. To remedy this disability the law allows the legal personal representative to retain his debt out of legal assets as against creditors of equal degree with himself.

The right extends to the executor of a sole executor. *Thomson v. Grant*, 1 Russ. 540, n.; *In re Owen*; *Poe v. Shortt*, 23 L. R. Ir. 328.

As between several legal personal representatives the right must be exercised rateably in proportion to their debts. *Chapman v. Turner*, 11 Vin. Ab. 72; 9 Mod. 268.

Right of administrator *durante minore ætate*.

If there is an administrator *durante minore ætate*, or to the use of another, for instance a lunatic, the administrator may retain not only his own debt, but also the debt of the infant or lunatic. *Roskelley v. Godolphin*, Sir T. Raym. 484; *Franks v. Cooper*, 4 Ves. 763.

Where payment by retainer valid.

If when the debt is retained the legal personal representative has no notice of a creditor of higher degree than himself he cannot afterwards be sued by such a creditor. *In re Fludger*; *Wingfield v. Erskine*, (1898) 2 Ch. 562.

Retainer limited to legal assets.

The right extends only to legal assets, i.e. such assets as come to the legal personal representatives *virtute officii*. Legal assets include the equity of redemption in a sum of money charged on land and in a term of years. *Hawkins v. Laure*, 1 Leon. 154; *Cook v. Gregson*, 3 Dr. 547; *Hanley v.*

*McDermott*, I. R. 9 Eq. 35; not following *Creditors of Sir Charles Cox*, 3 P. W. 341; *Hartwell v. Chitters*, Amb. 308. Chap. LI.

The legal personal representatives had no right of retainer against real estate, which was made equitable assets by the Administration of Estates Act, 1883 (3 & 4 Will. 4, c. 104). *Walters v. Walters*, 18 Ch. D. 182. Retainer as against real estate.

But now, by virtue of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1, 2, real estate, including real estate over which a person executes by will a general power of appointment but not copyholds, vests in the personal representative, and is to be administered in the same manner subject to the same liability for debts, and with the same incidents as if it were personal estate, but without altering the order of assets. The Act applies in cases of death after the 1st January, 1898. The result appears to be that real estate is now legal assets, and is subject to the right of retainer, and, in fact, that the only equitable assets now remaining are copyholds and personalty appointed under a general power of appointment. Effect of Land Transfer Act.

Property belonging to a married woman for her separate use, including earnings made her separate estate by the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), were equitable assets. *In re Poolr's Estate*; *Thompson v. Bennett*, 6 Ch. D. 739. Estate of married woman.

But now, by the Married Women's Property Acts, 1882 and 1893 (45 & 46 Vict. c. 75; 56 & 57 Vict. c. 63), a married woman's property appears to be made legal assets.

The right of retainer must be asserted, it does not act automatically; but it need not be asserted until something is done to interfere with the right; for instance, it may be exercised after an order to administer the estate in bankruptcy as regards assets in the executor's possession at that time. *In re Rhoades*, (1899) 2 Q. B. 347. Right must be asserted.

If the legal personal representative asserts the right in his lifetime but dies before exercising it, his legal personal representative may assert it after his death. *In re Compton*; *Norton v. Compton*, 30 Ch. D. 15; see *Burge v. Brutton*, 2 Ha. 373. Right, if asserted in lifetime, may be exercised after death.

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To what assets  
it is limited.

The right is limited to such legal assets as come into the possession or under the control of the legal personal representative, or are paid into Court during his life. *In re Compton*; *Norton v. Compton*, 30 Ch. D. 15; not following *Wilson v. Corwell*, 23 Ch. D. 764.

Retainer in  
specie.

If the assets are less than the debt the assets may be retained in specie. *In re Gilbert*, (1898) 1 Q. B. 282.

Effect of  
s. 10 of  
Judicature  
Act.

Sect. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), which introduces certain rules of administration in bankruptcy into the administration of the insolvent estate of a deceased person, does not affect the right of retainer. *Lee v. Nuttall*, 12 Ch. D. 61; *In re May*; *Crawford v. May*, 45 Ch. D. 499.

Retainer  
allowed only  
against  
creditors of  
equal degree.

The right of retainer can only be exercised as against creditors of equal degree. For instance, a simple contract debt cannot be retained as against a specialty debt, and in this respect Hinde-Palmer's Act has made no difference. *Talbot v. Frere*, 9 Ch. D. 568; *Wilson v. Corwell*, 23 Ch. D. 764; *Re Jones*; *Calver v. Larton*, 31 Ch. D. 440; *Hanley v. M'Dermott*, I. R. 9 Eq. 35.

What debts  
may be  
retained.

The right extends to legal debts requiring a complicated account, and also to equitable debts only ascertainable after a similar account. *In re Morris' Estate*; *Morris v. Morris*, 10 Ch. 68.

Debt vested  
in trustee.

It has been extended to a debt vested in a trustee for the legal personal representative. "It would be a vain thing for her to pay the 100l. to her own trustee with the one hand and to take it back from him with the other." *Cockcroft v. Black*, 2 P. W. 298; *Loane v. Casey*, 2 W. Bl. 965; *Loomes v. Stotherd*, 1 S. & St. 458.

But there is no right of retainer if the legal personal representative is not in substance the person to receive the debt. For instance, a sum due to the trustees of a marriage settlement for a breach of trust by the deceased cannot be retained by a legal personal representative who is only tenant for life under the settlement. *In re Dunning*; *Hatherley v. Dunning*, 54 L. J. Ch. 900.

Debt owing  
to executor  
jointly with

The right extends to a debt owing to the legal personal representative jointly with others (a); to a debt owing to one

of several representatives (b) ; and to a debt owing to the legal personal representative, as also legal personal representative of another estate, or as trustee or one of several trustees, though he becomes trustee only by virtue of his office of legal personal representative (c). *Crowder v. Stewart*, 16 Ch. D. 368 ; *In re Hubback* ; *International Marine Hydropathic Company v. Hawes*, 29 Ch. D. 934 (a) ; *Kent v. Pickering*, 2 Kee. 1 ; *In re Morris' Estate* ; *Morris v. Morris*, 10 Ch. 68 ; *In re Hubback*, *supra* (b) ; *For v. Garrett*, 28 B. 18 ; *Plumer v. Marchant*, 3 Burr. 1380 ; *Ferguson v. Gibson*, 14 Eq. 379 ; *Sander v. Heathfield*, 19 Ch. D. 21 ; *Re Faithfull*, 57 L. T. 14 ; *In re Hubback*, *supra* (c).

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others, to one of several executors, to executor as trustee.

It extends to a debt paid by the legal personal representative after the death, and even after judgment for administration as surety for the deceased (a) ; to an unmatured liability on a contract of suretyship on which there has been no actual payment (b) ; to a sum paid by the legal personal representative under an indemnity from the deceased (c) ; and to a claim for damages for breach of a pecuniary contract for which there is a certain standard (d). *Boyd v. Brooks*, 34 B. 7 ; see *Ferguson v. Gibson*, 14 Eq. 379 (a) ; *Re Orme* ; *Evans v. Maxwell*, 50 L. T. 51 ; *In re Owen* ; *Poe v. Shortt*, 23 L. R. Ir. 328 (b) ; *Wildes v. Dudlow*, 19 Eq. 198 (c) ; *Loane v. Casey*, 2 W. Bl. 965 ; *In re Compton* ; *Norton v. Compton*, 30 Ch. D. 15 (d).

Debt paid by surety, claim for damages.

It extends to a statute-barred debt, provided it has not been judicially decided to be barred (a) ; but not to debts which are not enforceable against the estate because the Statute of Frauds has not been complied with (b). *Stahlschmidt v. Lett*, 1 Sm. & G. 415 ; *Hall v. Walker*, 4 K. & J. 166 ; *Midgley v. Midgley*, (1893) 3 Ch. 282 (a) ; *In re Rownson* ; *Field v. White*, 29 Ch. D. 358 (b).

Debt barred by statute.

A legal personal representative who is entitled to an annuity under a covenant by the deceased may, if the estate is insolvent, retain arrears of the annuity due down to the time when any money claimed to be retained is dealt with, but not future payments. *In re Beeman* ; *Fowler v. James*, (1896) 1 Ch. 48.

Retainer in respect of annuity.

Sect. 3 of the Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75), which postpones a loan by the wife to the husband

Loan to husband in his business.

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for the purpose of his business to the claims of other creditors in case of the husband's bankruptcy, has been held not to affect the right of retainer in respect of the loan, where the husband's estate is administered in Chancery, though it may be insolvent. *In re May*; *Crawford v. May*, 45 Ch. D. 499; but *qu.* whether that decision is not in effect overruled by *In re Leug*; *Tarn v. Emmerson*, (1895) 1 Ch. 652, where such a loan was held to be postponed to the claims of the creditors if the estate is insolvent, and the right of retainer is only exercisable against debts of the same degree.

Whether  
executor can  
buy up debt.

It appears not to have been decided whether a legal personal representative can buy up a debt due by the testator and then retain it. He cannot retain a debt to which he becomes entitled as legatee of a creditor after the debt has been proved in an administration action. *Jones v. Evans*, 2 Ch. D. 420; see *Hepworth v. Heslop*, 6 Ha. 561.

Retainer not  
lost by  
administration  
bond.

The right of retainer is not destroyed by a bond given by an administrator in the old form to apply the assets in a due course of administration, rateably and proportionately, and according to the priority required by law, and not unduly preferring his own debt. *Davies v. Parry*, (1899) 1 Ch. 602 (see the new form, W. N. 1899, 262).

Judgments in  
creditor's  
action.

Nor by judgment for administration in a creditor's action. *Spicer v. James*, 2 M. & K. 387; *Thompson v. Cooper*, 1 Coll. 81; *Sharman v. Rudd*, 27 L. J. Ch. 844; *Nunn v. Barlow*, 1 S. & St. 588; *Davies v. Parry*, (1899) 1 Ch. 602; see *Player v. Foxhall*, 1 Russ. 538.

Proof of debt.

Nor by proving the debt in such an action or even part payment in the action before the creditor became legal personal representative. *Nunn v. Barlow*, 1 S. & St. 588; *In re Harrison*; *Latimer v. Harrison*, 32 Ch. D. 395; *Davies v. Parry*, (1899) 1 Ch. 602.

Payment into  
Court.

The right is not lost by payment into Court by the legal personal representative, or by a third person ordered to make such payments in his presence (a); or by payment by the legal personal representative to a receiver appointed in a creditor's administration action (b). *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Chisum v. Deures*, 5 Russ. 29; *Tipping v.*



*Power*, 1 Ha. 405; *Richmond v. White*, 12 Ch. D. 361; *In re Compton*, 30 Ch. D. 15; *Hanley v. M'Dermott*, I. R. 9 Eq. 35. (a); *In re Harrison*; *Latimer v. Harrison*, 32 Ch. D. 395 (b). Chap. LI.

The right has priority over the costs of the action. *Chissum v. Dewes*; *Tipping v. Power*, *supra*.

Payment to an officer of the Court in ignorance of the right of retainer will not destroy the right. *Ex parte James*, 9 Ch. 609; *Ex parte Simmonds*, 16 Q. B. D. 308; *In re Rhoades*, (1899) 2 Q. B. 347. Payment to officer of Court in ignorance.

After the appointment of a receiver, the legal personal representative has no claim against assets got in by the receiver. *In re Jones*; *Calver v. Laxton*, 31 Ch. D. 440; *In re Harrison*; *Latimer v. Harrison*, 32 Ch. D. 395; see *In re Birt*; *Birt v. Burt*, 22 Ch. D. 604. Assets got in by receiver.

But a receiver will not be appointed merely to destroy the right of retainer. *In re Wells*; *Molony v. Brooke*, 45 Ch. D. 569.

The existence of a right of retainer is not alone sufficient ground for a transfer of the administration of an insolvent estate into bankruptcy; nor, on the other hand, will such a right prevent the exercise of the judicial discretion to make a transfer. *In re York*; *Atkinson v. Powell*, 36 Ch. D. 233; *In re Baker*; *Nichols v. Baker*, 44 Ch. D. 262. Administration in bankruptcy.

A fund will not be paid out of Court to a legal personal representative to enable him to exercise a right of retainer, at any rate, after an inquiry as to the persons entitled has been ordered in his presence. *Trevor v. Hutchins*, (1896) 1 Ch. 844. Payment out of Court.

If the legal personal representative, by exercising the right of retainer, has paid himself in part, he will not be allowed to prove against assets which cannot be retained, until the other creditors have been paid a dividend equal to the dividend he received by means of the retainer. *Bain v. Sadler*, 12 Eq. 570. Right of proof after retainer.

#### *Retainer by Heir or Devisee.*

A creditor by specialty in which the heirs were bound had, prior to the Administration of Estates Act, 1833 (3 & 4 Will. IV. c. 104), a right of action against the heir and devisee of the debtor; and, therefore, upon principles precisely similar to those Retainer by heir or devisee.

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upon which the legal personal representative was allowed to retain, the heir or devisee, if himself a creditor by specialty, could retain his debt against the land. *Loomes v. Stotherd*, 1 S. & S. 458.

This right was not affected by the Administration of Estates Act, 1883 (3 & 4 Will. IV. c. 104), nor, it seems, by Hinde-Palmer's Act (32 & 33 Vict. c. 46). *In re Illidge; Davidson v. Illidge*, 27 Ch. D. 478.

The right does not extend to simple contract debts. *Bain v. Sadler*, 12 Eq. 570; *In re Illidge; Davidson v. Illidge*, 27 Ch. D. 478; where *Hall v. Macdonald*, 14 Sm. 1; *Ferguson v. Gibson*, 14 Eq. 379, are discussed.

A devisee on trust to sell and pay debts had no right of retainer. *Bain v. Sadler*, *supra*.

*Specific Directions as to Debts.*

Testators frequently give directions with reference to debts.

Charge of debts includes debts subsisting at the death.

A direction to pay debts includes all the legal debts of the testator subsisting at his death, but not debts barred by statute. *Burke v. Jones*, 2 V. & B. 275; *Maxwell v. Maxwell*, L. R. 4 H. L. 506; see *Hawkins v. Hawkins*, 13 Ch. D. 470.

Trust to pay debts.

A trust for payment of debts out of personalty will not prevent the statute from continuing to run. *Scott v. Jones*, 4 Cl. & F. 382; *In re Hepburn*, 14 Q. B. D. 894.

But a similar trust to pay them out of real estate will keep them alive against the realty for twelve years. *In re Stephens; Warburton v. Stephens*, 43 Ch. D. 39.

Possibly a direction to pay specific debts barred by statute would revive them. See *Clinton v. Brophy*, 10 Ir. Eq. 139; *In re Bermingham*, I. R. 4 Eq. 187; *In re Warnock's Estate*, I. R. 11 Eq. 212.

Damages accrued after the death.

A charge of debts will include damages accrued after the testator's death on an equitable liability to indemnify and damages recovered in respect of a covenant broken after the testator's death. *Willson v. Leonard*, 3 B. 373; *Morse v. Tucker*, 5 Ha. 79.

Debts due at a particular time.

And though there may be words limiting the debts to a particular class of debts, such as debts due at a particular

period of the testator's life, the Court will, if possible, adopt the wider construction, so as to include all the debts. *Bridgman v. Dore*, 3 Atk. 201; *Dormay v. Borradaile*, 10 B. 263; *Birmingham v. Burke*, 2 J. & Lat. 699.

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A direction to pay the debts of another person includes the debts subsisting at his death, but not debts barred by statute. *O'Connor v. Haslam*, 5 H. L. 170; see, too, *Martin v. Smyth*, 3 L. R. Ir. 417; 5 *ib.* 266.

Direction to pay debts of another.

### *Partnership Debts.*

A creditor of a partnership of which one partner is dead has concurrent remedies against the estate of the deceased partner and the surviving partners, and it makes no difference which remedy he pursues first. He may have the estate of the deceased administered in order that the separate estate may be applied in paying the separate debts and then in paying the joint debts. It is not necessary to show that the partnership is insolvent. *Wilkinson v. Henderson*, 1 M. & K. 582; *In re Hodgson*; *Beckett v. Ramsdale*, 81 Ch. D. 177; *In re Doetsch*; *Mattheson v. Ludwig*, (1896) 2 Ch. 836.

### *Creditors by Subrogation.*

In some cases, persons who are not directly creditors of the testator may acquire rights against the estate.

Debts incurred by the executor, for instance, in carrying on the business of the testator, are the executor's debts, and the creditors to whom these debts are owing have no direct remedy against the testator's estate. They cannot prove against the estate or take the testator's assets in execution. *Ex parte Garland*, 10 Ves. 110; *Owen v. Delamere*, 15 Eq. 134; *Abbott v. Parfitt*, L. R. 6 Q. B. 346; *Fairland v. Percy*, 3 P. & D. 217; *Farhall v. Farhall*, 7 Ch. 123; *Hall v. Fennell*, 1 R. 9 Eq. 406, 615; *In re Morgan*; *Pillgrem v. Pillgrem*, 18 Ch. D. 93; *Lord Talbot de Malahide v. Moran*, 8 L. R. Ir. 307.

Debts incurred by executors.

But if the debts are properly incurred, the executor is entitled to be indemnified against them out of the estate, and the creditors are in equity entitled to the benefit of the executor's indemnity.

Executor's right of indemnity.

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Damages  
for tort.

The indemnity extends to damages recovered against the executor for a tort committed in managing the estate. *Bennett v. Wyndham*, 4 D. F. & J. 259 ; *In re Raybould* ; *Raybould v. Turner*, (1900) 1 Ch. 199.

Executor's  
right is subject  
to equities.

The right to indemnity is the executor's right ; it is therefore subject to any equities between him and the estate. For instance, if upon taking the accounts he is indebted to the estate, his right, and therefore the right of his creditors to indemnity, is diminished by the amount of his indebtedness. *In re Johnson* ; *Shearman v. Robinson*, 15 Ch. D. 548 ; *Strickland v. Symons*, 22 Ch. D. 666 ; 26 Ch. D. 245 ; *In re Evans* ; *Evans v. Evans*, 34 Ch. D. 597 ; see *Re Kidd* ; *Kidd v. Kidd*, 70 L. T. 648 ; 42 W. R. 571 ; *Re Shorey* ; *Smith v. Shorey*, 79 L. T. 349.

Rights as  
between  
creditors of  
testator and  
of executor.

Nothing in the will can affect the rights of the testator's creditors. As, against them, therefore, the executor carrying on the business is entitled to indemnity only if the carrying on was reasonable in order to pay the debts, or if the creditors assented to the business being carried on.

If it was not reasonable, or there was no assent, it is open to the testator's creditors to repudiate the executor's act and to treat it as a devastavit or to adopt it, in which case the executor is entitled to be indemnified against the debts he has incurred. Through the medium and to the extent of this indemnity the executor's creditors may acquire priority over the testator's creditors. The same result follows if the creditors stand by and allow the business to be carried on. *Dowse v. Gorton*, (1891) A. C. 190 ; *In re Brooke* ; *Brooke v. Brooke*, (1894) 2 Ch. 600 ; *In re Hodges* ; *Hodges v. Hodges*, (1899) 1 Ir. 480.

No distinction can for this purpose be drawn between the testator's estate at his death and assets subsequently created by the executor. *Dowse v. Gorton*, (1891) A. C. 190.

Rights as  
between  
creditors of  
executor and  
beneficiaries.

As between the creditors of the executor and the beneficiaries the rights depend upon the will, and for this purpose persons dealing with the executor must be taken to know the contents of the will. If the executor has no authority to carry on the business he has no right to an indemnity, and his creditors

have no right against the estate. If the will confers authority to carry on the business for a limited period, persons becoming creditors after that period have no claim against the estate. *Cutbush v. Cutbush*, 1 B. 184; *Gallagher v. Ferris*, 7 L. R. Ir. 489.

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### *Foreign Creditors, &c.*

The proper order and priority of distribution of assets is always a matter for the *lex fori*, and the country where the distribution takes place always claims to itself the right to regulate the course of distribution. Per Lord Cairns, *Thorburn v. Steward*, L. R. 3 P. C. 478, 518; *Ex parte Melbourne*, 6 Ch. 64.

*Lex fori*  
governs  
priorities.

Therefore, a creditor who has by contract obtained some priority abroad which would not be recognised here cannot assert such priority against a fund administered here. *Pardo v. Bingham*, 6 Eq. 485.

Foreign assets are administered among the foreign creditors according to the *lex fori*.

Foreign assets  
administered  
according to  
*lex fori*.

If such assets are remitted to England before the foreign creditors are paid they will be administered according to the foreign law for the benefit of those creditors. *Cook v. Gregson*, 2 Dr. 286.

In administering assets here, whether the domicile of the deceased was English or foreign, all creditors, English and foreign, are admitted *pari passu*. *In re Kloebe; Kannreuther v. Geiselbrecht*, 28 Ch. D. 175.

## B. THE ORDER OF ASSETS.

The order in which the assets of a testator are applied in administration is as follows:—

I. The general personal estate, not specifically bequeathed, including personalty over which the testator has a general power of appointment, and which passes under the residuary gift by virtue of sect. 27 of the Wills Act. *Manning v. Spooner*, 3 Ves. 117; *In re Hartley*, (1900) 1 Ch. 152.

I. General  
personal  
estate.

If a specific fund of personalty is charged with payment of debts and legacies, that is sufficient to make it primarily liable if the residue is effectually disposed of (a), but if no disposition

Charge of  
debts on  
specific fund  
of personalty.

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of residue is attempted, the residue is primarily liable (*b*). *Broune v. Groombridge*, 4 Mad. 495; *Choat v. Yeats*, 1 J. & W. 102; *Evans v. Evans*, 17 Sim. 106; *Phillips v. Eastwood*, 1 Ll. & G. 294; *Webb v. De Beauvoisin*, 31 B. 573; *Vernon v. Earl Manvers* (No. 2), *ib.* 623; *Longfield v. Bantry*, 15 L. R. Ir. 101 (*a*); *Holford v. Wood*, 4 Ves. 78; *Howse v. Chapman*, *ib.* 542; *Hewett v. Snare*, 1 De G. & S. 333; *Newbegin v. Bell*, 23 B. 386; *Corbet v. Corbet*, 1 R. 8 Eq. 407; see *Re Williams*; *Green v. Burgess*, 59 L. T. 310 (*b*).

In the same way, if personalty is conveyed by the testator upon trust to pay his debts after his death, that is the primary fund for payment of debts. *Trott v. Buchanan*, 28 Ch. D. 446.

If a portion of the specific fund is undisposed of, that portion bears only its proportion of the debts, &c., rateably with the rest of the fund. *Howse v. Chapman*, 4 Ves. 542.

Lapsed share  
of residue  
contributes  
rateably.

Residue of personal estate is what remains after payment of funeral and testamentary expenses, debts and legacies, and the costs of administration, including costs of an administration action. Therefore, a share of residue which is undisposed of bears only its proportion of expenses, debts, legacies and costs rateably with the other shares.

This is the case whether the share is undisposed of by reason of lapse, or because the legatee is incapable of taking. *Cresswell v. Cheslyn*, 2 Ed. 123; as explained in *Skrymsher v. Northcote*, 1 Sw. 566, p. 571; *Eyre v. Marsden*, 4 M. & Cr. 231; *A.-G. v. Lord Winchilsea*, 3 B. C. C. 373; *S. C., A.-G. v. Hurst*, 2 Cox, 364; *Trethewy v. Helyar*, 4 Ch. D. 53; *Fenton v. Wills*, 7 Ch. D. 33; *Blann v. Bell*, *ib.* 382; overruling *Gowan v. Broughton*, 19 Eq. 77, so far as *contra*.

On the same principle, if the residue is directed to be accumulated for a period longer than is allowed by the Thellusson Act, so that there is an intestacy during the period of excess, debts must be borne by the general residue and not by the income which is undisposed of. *Eyre v. Marsden*, 4 M. & Cr. 231; *Oddie v. Brown*, 4 De G. & J. 179; *Ralph v. Carrick*, 5 Ch. D. 984, 998.

II. Real  
estate devised  
for payment  
of debts.

II. Real estate devised or ordered to be sold for payment of debts, whether it descends to the heir or not. *Milnes v. Slater*,

8 Ves. 295; *West v. Lawday*, I. R. 2 Eq. 517; *Phillips v. Parry*, 22 B. 279; *Stead v. Hardaker*, 15 Eq. 175. Chap. LI.

III. Real estate which descends either because no disposition is made of it (a) or by reason of lapse (b). It makes no difference that there is a general charge of debts. *Galton v. Hancock*, 2 Atk. 424; *Barber v. Wood*, 4 Ch. D. 885; *Wood v. Ordish*, 3 Sm. & G. 125 (a); *Williams v. Chitty*, 3 Ves. 545 (b). III. Real estate descending to the heir.

An attempt has been made to draw a distinction between real estate descended by reason of lapse and real estate of which no disposition is attempted. See *Scott v. Cumberland*, 18 Eq. 578, the argument; *Hurst v. Hurst*, 28 Ch. D. 159; but the distinction seems unfounded.

IV. Real estate charged with payment of debts and devised subject to the charge. *Wride v. Clarke*, 2 B. C. C. 261, n.; *Harwood v. Oglander*, 8 Ves. 124. IV. Real estate charged with debts.

A lapsed share of real estate devised subject to a charge of debts to several as tenants in common only contributes its rateable proportion with the other shares. *Fisher v. Fisher*, 2 Kee. 619; *Wood v. Ordish*, 3 Sm. & G. 125; *Peacock v. Peacock*, 13 W. R. 516; 34 L. J. Ch. 315; *Ryres v. Ryres*, 11 Eq. 539. *Scott v. Cumberland*, 18 Eq. 578; *Astley v. Micklethwait*, 15 Ch. D. 59; so far as inconsistent with the other cases, would probably not be followed.

It has become usual in the text-books to insert pecuniary legacies as the fifth class of assets. It seems illogical to do this. Pecuniary legacies are not assets of the testator. His assets are his personal estate, out of which the legacies are payable. The right of pecuniary legatees to payment out of real estate charged with payment of debts, if the personalty is exhausted in paying debts, depends on the doctrine of marshalling; see *post*. Pecuniary legacies are therefore omitted here. Pecuniary legacies are not assets.

V. Real estate devised, not charged with debts (including residuary real estate), and specifically bequeathed personal estate rateably. *Tombs v. Roch*, 2 Coll. 490; *Hensman v. Fryer*, 3 Ch. 420 (see *Lancefield Iggulden*, 10 Ch. 136); *Jackson v. Pease*, 19 Eq. 96. V. Real estate devised not charged with debts and specific gifts.

The real estate must contribute in proportion to its value without any deduction in respect of legacies or annuities charged

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upon it by the will. *In re Saunders-Davies; Saunders-Davies v. Saunders-Davies*, 34 Ch. D. 482; *In re Barden; National Provincial Bank of England v. Cresswell*, (1894) 1 Ch. 693.

Direction making specific bequest liable before specific devise.

The testator may make specific bequests applicable before specific devises by directing, for instance, that his debts are to be paid out of his personalty (except leaseholds) if sufficient, and if not out of his realty. *Bateman v. Hotchkin*, 10 B. 426.

VI. Property appointed.

VI. Property expressly appointed by the will under a power of appointing, whether by deed or will or by will only. *Fleming v. Buchanan*, 3 D. M. & G. 976; *Hawthorn v. Shedden*, 3 Sm. & G. 305; *Petre v. Petre*, 14 B. 197; *Williams v. Lomas*, 16 B. 1.

Execution of general power by married woman.

By sect. 4 of the Married Women's Property Act, 1882, it is enacted that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

The effect of the Act is to make the appointed property liable to her debts (including debts existing when the Act came into operation), though she may have had no separate estate at the time when the debts were contracted. *In re Ann; Wilson v. Ann*, (1894) 1 Ch. 549; *In re Hughes; Brandon v. Hughes*, (1898) 1 Ch. 529.

An appointment for a purpose which fails, for instance, in satisfaction of a debt which is paid after the death of the testatrix, makes the appointed funds assets. *In re Hodgson; Darley v. Hodgson*, (1899) 1 Ch. 666.

Exercise of general power by married woman.

For the decisions on this subject before the Act see *Vaughan v. Vanderstegen*, 2 Drew. 165, 363; *Johnson v. Gallagher*, 3 D. F. & J. 494; *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572; *Mayd v. Field*, 3 Ch. D. 587; *In re Harvey's Estate; Godfrey v. Harben*, 13 Ch. D. 216; *Hodges v. Hodges*, 20 Ch. D. 749; *In re Roper; Roper v. Doncaster*, 39 Ch. D. 482; *In re Parkin; Hill v. Schwarz*, (1892) 3 Ch. 510; *Ex parte Gilchrist*, 17 Q. B. D. 521.

VII. Land is governed by the *lex loci*

VII. Land in a foreign country is governed by the *lex loci rei sitæ* and is only liable to such debts as would be cast upon by the law of that country. *Harrison v. Harrison*, 8 Ch. 342; see *In re Hewit; Lawson v. Duncan*, (1891) 3 Ch. 568.



## C. CHARGE OF DEBTS.

## 1. General direction to pay debts:—

A general direction to pay debts charges them upon real estate devised by the will. *Clifford v. Lewis*, 6 Mad. 33; *Ball v. Harris*, 8 Sim. 485; 4 M. & Cr. 264; *Shaw v. Borrer*, 1 Kee. 559; *Harding v. Grady*, 1 D. & War. 430; *Elliot v. Montgomery*, 1 R. 7 Eq. 214.

General direction to pay debts charges realty.

Whether real estate would be charged by such a direction where the will only attempts to dispose of personalty seems doubtful. The remarks of Sir R. P. Arden, in *Shallcross v. Finden*, 3 Ves. 799, probably only contemplate a case of lapse.

Whether realty left to descend would be charged.

A subsequent express charge of particular debts upon certain estates or upon all the real estate will not overrule the general direction. *Taylor v. Taylor*, 6 Sim. 246; *Forster v. Thompson*, 4 D. & War. 303. *Douce v. Lady Torrington*, 2 M. & K. 600, is overruled.

Subsequent express charge of certain debts on particular estates.

Nor will a subsequent express charge of all the debts upon the personalty. *Price v. North*, 1 Ph. 85; *Graves v. Graves*, 8 Sim. 43; *Hartland v. Murrell*, 27 B. 204.

Subsequent charge of all debts on personalty.

But a subsequent express charge of all the debts upon particular portions of the realty would, it seems, overrule the general direction. *Palmer v. Graves*, 1 Kee. 545. This distinction reconciles the case with those previously cited; but *quere*, whether it is substantial.

Subsequent charge of all debts upon portions of the realty.

So, too, if certain real estate is expressly excepted out of a subsequent charge of debts upon a portion of the realty, the general direction is controlled. *Thomas v. Britnell*, 2 Ves. Sen. 313.

Exception of certain real estate out of a subsequent charge.

An express charge of debts on real and personal estate is not controlled by subsequent partial charges. *Wrigley v. Sykes*, 21 B. 337.

Express charge not controlled by partial charges.

Where a testator authorised his executors "to adjust and pay all claims made upon my estate," it was held that these words did not charge debts on the real estate. *In re Head's Trustees & Macdonald*, 45 Ch. D. 310.

## 2. Direction to executors to pay debts:—

a. If the executor is directed to pay the debts, they are not charged upon the real estate unless real estate is expressly

Direction to executors to pay debts will

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not charge  
realty where  
no land is  
devised to  
them.

devised to him. *Keeling v. Brown*, 5 Ves. 359; *Powell v. Robins*, 7 Ves. 209; *Cook v. Dawson*, 29 B. 123; 3 D. F. & J. 127.

A direction to an executor to pay debts, followed by a devise to another person introduced by the word "then," will not charge the land. *Brydges v. Lande*, 3 Russ. 346, n.; 3 Ves. 550; *Willan v. Lancaster*, 3 Russ. 108.

But if the real estate is devised "subject as aforesaid," it is charged. *Dowling v. Hudson*, 17 B. 248.

Land devised  
to the execu-  
tors is charged.

b. If land is devised to the executors, either in trust or beneficially, it is a question of construction whether it is charged with debts. *Primâ facie* it is so charged. *Barker v. Duke of Devonshire*, 3 Mer. 310; *Henvell v. Whitaker*, 3 Russ. 343; *Dormay v. Borradaile*, 10 B. 263; *Hartland v. Murrell*, 27 B. 204; *Bentley v. Robinson*, 10 Ir. Ch. 293; *In re Tanqueray-Willaine & Landau*, 20 Ch. D. 465; *In re De Burgh Lawson*; *De Burgh Lawson v. De Burgh Lawson*, 41 Ch. D. 568; *Re Stokes*; *Parsons v. Miller*, 67 L. T. 223.

Where the  
devise is  
for life or in  
tail.

It makes no difference apparently that the devise is of an estate tail or of an estate for life. *Cloudsley v. Pelham*, 1 Vern. 411; 1 Eq. Ab. 198, pl. 2; *Harris v. Watkins*, Kay, 438; *Cook v. Dawson*, 29 B. 123; see 3 D. F. & J. 127; see *Finch v. Hattersley*, 3 Russ. 345, n.; *Doc d. Ashby v. Baines*, 2 C. M. & R. 23.

Devises to  
executors  
unequally.

On the other hand, if land is devised only to one of several executors or unequal interests are devised to them, or land is devised to a son absolutely, and other land is devised to the executors upon trust for the daughters, there is no charge. *Warren v. Davies*, 2 M. & K. 49; *Symons v. James*, 2 Y. & C. C. 301; *Wasse v. Helsington*, 3 M. & K. 495; *In re Bailey*; *Bailey v. Bailey*, 12 Ch. D. 268.

Gift after  
payment of  
debts.

A gift of real and personal estate after payment of debts charges both. *Withers v. Kennedy*, 2 M. & K. 607; *Moore v. Whittle*, 22 L. J. Ch. 207.

Gift of  
residue after  
direction to  
pay debts.

8. When debts are directed to be paid by the executors and there is a gift of the residue of the real and personal estate together, the debts are charged upon the entire residue. *In re Bailey*, 12 Ch. D. 268, 274. As to legacies, see *post*.

## 4. Charge upon income or corpus :—

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It would seem that a power to raise money out of the rents and profits would naturally mean out of the annual rents and profits, but the cases show that a power to raise a lump sum out of rents and profits will authorise a sale. See *Bootle v. Blundell*, 1 Mer. 233, per Lord Eldon; *Baines v. Dixon*, 1 Ves. Sen. 42.

Power to raise out of rents and profits to pay debts or legacies.

This is clear, at any rate, where the object is to pay debts or legacies. *Lingon v. Foley*, 2 Ch. Ca. 205; *Anon.*, 1 Vern. 104; *Berry v. Askham*, 2 Vern. 26; *Metcalf v. Hutchinson*, 1 Ch. D. 591; *Lord Londesborough v. Somerville*, 19 B. 295.

Or, if the money is to be raised within a given time, and the annual rents would be insufficient to raise the money within that time. *Sheldon v. Dormer*, 2 Vern. 310; *Warburton v. Warburton*, *ib.* 420; *Gibson v. Lord Montfort*, 1 Ves. Sen. 491.

Money payable within a given time.

Portions, it would seem, are on the same footing as debts, as it is to be presumed that they are to be paid within a limited time. *Trafford v. Ashton*, 1 P. W. 415; *Stanhope v. Thacker*, Prec. Ch. 435.

Portions.

Similarly, if a gross sum payable out of rents and profits is payable at once, it may be raised by sale. *Allan v. Backhouse*, 2 V. & B. 65; Jac. 631.

Gross sum payable at once.

But a direction to pay out of annual rents and profits does not create a charge on corpus. *In re Green*; *Baldock v. Green*, 40 Ch. D. 610.

Annual rents.

And if the testator treats the rents and profits as applicable for some time for the purpose of raising the money, and gives the whole lands from and after raising the money, the power will be limited to the annual rents and profits. *Small v. Wing*, 5 B. P. C. 68; see *Harper v. Munday*, 7 D. M. & G. 369; *Heneage v. Lord Andover*, 3 Y. & J. 360; *Lord Lovat v. Duchess of Leeds*, 2 Dr. & Sm. 75.

When the annual rents only are applicable.

## D. EXONERATION OF PERSONALTY.

The testator may give directions by his will altering the order of assets. He may appoint a specific fund of personality to pay debts, or he may direct realty to be applied *pari passu*

Directions to exonerate personality.

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with the personality, or he may exonerate the personality altogether.

1. When  
realty and  
personalty  
liable rateably.

A gift of realty and personality together on trust to pay debts (a), or the fact that a mixed fund of personality and proceeds of sale of realty is charged with payment of debts under the rule in *Greville v. Browne*, or otherwise (b), does not alter the primary liability of the personality. *Boughton v. Boughton*, 1 H. L. 406; *Tench v. Cheese*, 6 D. M. & G. 453 (a); *Luckcraft v. Pridham*, 48 L. J. Ch. 686; *Wells v. Row*, 48 L. J. Ch. 476; *Elliott v. Dearsley*, 16 Ch. D. 322; *In re Ovey*; *Broadbent v. Barrow*, 31 Ch. D. 113; *In re Boards*; *Knight v. Knight*, (1895) 1 Ch. 499 (b).

Debts to be  
paid out of  
mixed fund.

But if realty is given upon trust for sale and blended with personality, and there is a trust to pay debts out of the mixed fund, the realty and personality are liable rateably. *Roberts v. Walker*, 1 R. & M. 752; *Stocker v. Harbin*, 3 B. 479; *Salt v. Chattaway*, ib. 576; *Dunk v. Fenner*, 2 R. & M. 557; *Fourdrin v. Goudey*, 3 M. & K. 383; *Tatlock v. Jenkins*, *Kay*, 654; *Bedford v. Bedford*, 35 B. 584.

The same result follows if the realty is directed to be converted and become part of the personal estate. *Simmons v. Rose*, 6 D. M. & G. 411; *Bright v. Larcher*, 3 De G. & J. 148.

It is not necessary that there should be an absolute direction to convert the realty, it is enough if the testator contemplates the creation of a mixed fund of personality and proceeds of realty out of which the legacies are to be paid. *Allan v. Gott*, 7 Ch. 489.

2. When  
personalty  
exonerated.

Neither a charge of debts upon land nor a devise of land on trust to pay debts exonerates the personality from its primary liability. There must be an intention shown not only to charge the land but to exonerate the personality. *Bootle v. Blundell*, 1 Mer. 193, p. 219; *White v. White*, 2 Vern. 43; *Walker v. Hardwick*, 1 M. & K. 396; *Ouseley v. Anstruther*, 10 B. 453; *Quennell v. Turner*, 13 B. 240; *Hancox v. Abbey*, 11 Ves. 186; *Collis v. Robins*, 1 De G. & S. 131; *Kilford v. Blaney*, 29 Ch. D. 145; 31 Ch. D. 56.

A conveyance by the testator in his lifetime of land upon trust after his death to pay his debts does not exonerate

the personalty. *French v. Chichester*, 2 Vern. 568; 2 B. P. C. 16; *Trott v. Buchanan*, 28 Ch. D. 446.

And where the land of a tenant in tail is delivered in execution under 51 & 52 Vict. c. 51, which gives the judgment creditor a charge as against the issue in tail, and the judgment is paid off out of the personalty, the personalty is not entitled to exoneration out of the land. *In re Anthony*; *Anthony v. Anthony*, (1893) 3 Ch. 498.

It seems a devise upon condition that the devisee shall pay the testator's debts will not exonerate the personalty. *Bridgman v. Dove*, 3 Atk. 201; *Meade v. Hide*, 2 Vern. 120; *Henry v. Henry*, 1 R. 6 Eq. 286; see *In re Kirk*; *Kirk v. Kirk*, 21 Ch. D. 481.

A direction that the proceeds of sale of land are to be applied in "part payment" of legacies (a), or a charge upon the land as a primary fund (b), or a direction that certain debts shall be paid out of certain land exclusively and in the first instance (c), or that if the land devised for payment of debts is insufficient a particular part of the personalty is to be applied (d), is sufficient to exonerate the general personal estate. *Bunting v. Marriott*, 19 B. 168 (a); *Davies v. Scott*, 5 Russ. 32 (b); *Forrest v. Prescott*, 10 Eq. 545 (c); *Kilford v. Blaney*, 31 Ch. D. 56 (d).

What amounts to a direction to exonerate.

The cases are numerous in which the question of the exoneration of personalty has been considered. They are generally complicated, and depend on the construction of the particular will without laying down any principles. The following points may be noted here.

An express charge of certain debts, for instance simple contract debts, upon the personalty will not exonerate it from its primary liability to the other debts. *Brydges v. Phillips*, 6 Ves. 567; *Watson v. Brickwood*, 9 Ves. 447.

A charge upon the realty of debts and funeral and testamentary expenses, which latter it can hardly be supposed the personalty would not be sufficient to pay, is not enough to show that the realty was to be primarily liable. *Walker v. Jackson*, 2 Atk. 624; *Gray v. Minnethorpe*, 3 Ves. 103; *Hartley v. Hurle*, 5 Ves. 540; see *Coote v. Coote*, 3 J. & Lat. 175.

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Personal  
estate specifi-  
cally given.

But where the whole personal estate is given not as a residue but specifically and the realty is subject to all the charges to which the personalty would be liable, the personalty is exonerated; if, for instance, all the personalty is given and the realty is charged with debts, funeral expenses and costs of administration. *Greene v. Greene*, 4 Mad. 148; *Michell v. Michell*, 5 Mad. 69; *Blount v. Hipkins*, 7 Sim. 43; *Lance v. Aglionby*, 27 B. 65; *Gilbertson v. Gilbertson*, 34 B. 354; see *Kilford v. Blaney*, 29 Ch. D. 145; 31 Ch. D. 56.

And where the personalty was specifically given and a particular estate was devised upon trust to pay debts, funeral and testamentary expenses, upon failure of that estate, the general personalty and the realty were held liable *pro ratâ* to make up the deficiency. *Powell v. Riley*, 12 Eq. 175; disapproved by Jessel, M.R.; *In re Ovey*; *Broadbent v. Barrow*, 51 L. J. Ch. 665, 667.

Specific gift  
of personalty  
to an executor.

The fact, however, that the gift of all the personalty is to a person appointed executor is a strong argument against the exoneration of the personalty. *Brummel v. Prothero*, 3 Ves. 111; *Aldridge v. Lord Wallscourt*, 1 Ba. & Be. 312.

And when it is doubtful whether the whole personal estate is meant to be given specifically or only as a residue, the fact that funeral and testamentary expenses are not charged on the realty as well as the debts is an argument against exoneration. *Collis v. Robins*, 1 De G. & S. 131; *Ouseley v. Anstruther*, 10 B. 453; *Bootle v. Blundell*, 1 Mer. 193; 19 Ves. 494; see *Tower v. Lord Rous*, 18 Ves. 138.

Effect of  
charge of  
particular  
debts on  
realty.

A charge of a particular debt, for instance, an annuity secured by bond, on realty and specific personalty, has been held insufficient to exonerate the general personalty, though the language may be strong enough to have that effect. *Quennell v. Turner*, 13 B. 240; *Welby v. Rockcliffe*, 1 R. & M. 571; see *Bickham v. Cruttwell*, 3 M. & Cr. 763.

Under the old law, by which the devisee of land subject to a mortgage was entitled to have the mortgage debt paid out of the personalty, a devise of lands, including the mortgaged land on trust for sale and payment of the mortgage debt, or a declaration that the mortgage debt was to be

charged upon the land, has been held to 'make the land primarily liable. *Hancox v. Abbey*, 11 Ves. 179; *Evans v. Cockeram*, 1 Coll. 428; see *Corballis v. Corballis*, 9 L. R. Ir. 309.

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Where debts have been paid out of the personal estate and the real estate is bound to bear its rateable proportion, the real estate will be charged with interest upon the amount it ought to contribute. *Ashworth v. Munn*, 34 Ch. D. 391.

Where there is a direction that the personalty is to be exempt from payment of debts, and certain land is devised for their payment and that land proves insufficient, the debts are payable out of the other real estate of the testator in exoneration of the personalty. *Morrow v. Bush*, 1 Cox, 185; *Young v. Young*, 26 B. 522.

Fund to be applied in exoneration insufficient.

But if land is devised for payment of debts in exoneration of the personalty, the personalty remains liable if the land so devised is insufficient. *Colvile v. Middleton*, 3 B. 570.

As between land and residue, both given exempt from debts, the residue is primarily liable on failure of other funds. *Lord Brooke v. Earl of Warwick*, 1 H. & T. 142.

Where the personalty is to be exonerated, the exoneration is assumed to be for the purposes of the dispositions of the will; and if the gift of the exonerated personalty fails, the exoneration, whether out of real or personal estate, does not enure for the benefit of the next of kin. *Waring v. Ward*, 5 Ves. 676; *Noel v. Lord Henley*, 7 Pr. 241; *Dan.* 211; *Dacre v. Patrickson*, 1 Dr. & S. 186; *Kilford v. Blaney*, 31 Ch. D. 56; overruling *Browne v. Groombridge*, 4 Mad. 495, so far as *contra*.

Effect of lapse of exonerated personalty.

If the personalty is exonerated from debts and no disposition made of it, it is exonerated for all purposes. *Milnes v. Slater*, 8 Ves. 305; see 1 Dr. & S. 186.

In connection with this subject it is to be remembered that a covenant in a settlement to pay a jointure which is charged on real estate leaves the real estate primarily liable, as the covenant is only ancillary to the security. *Lanoy v. Duke of Athol*, 2 Atk. 444; *Lechmere v. Charlton*, 15 Ves. 193; *Graves v. Hicks*, 6 Sim. 398; *Loosemore v. Knapman*, Kay, 123.

Covenant in settlement to pay jointure charged on realty.

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## E. PAYMENT OF LEGACIES.

Pecuniary legacies payable out of personalty.

Pecuniary legacies are *primâ facie* payable out of the personal estate not specifically bequeathed, and the residuary legatee can take nothing till the pecuniary legacies are paid. For this purpose a fund which is subject to a general power of appointment, and passes under a residuary bequest by virtue of sect. 27 of the Wills Act, is in the same position as the rest of the residue. *In re Hartley*, (1900) 1 Ch. 152.

Legacy in lieu of revoked share of residue.

Legacies given in lieu of a share of residue, the gift of which is revoked and thereby becomes undisposed of, are payable out of the general residue and not out of the lapsed share (a), unless an intention can be gathered that they are to be paid out of the lapsed share (b). *Sykes v. Sykes*, 4 Eq. 200; 3 Ch. 301 (a); *In re Woods' Will*, 29 B. 236; *Walsh v. Walsh*, 1 R. 4 Eq. 396 (b).

Personal estate given specifically.

The whole of the personal estate may be given in such a way as to be a specific gift, but this must be clearly expressed; and, *primâ facie*, if legacies are given, a gift of the whole personal estate is subject to the payment of the legacies. *Robertson v. Broadbent*, 8 App. C. 812.

Residuary realty not liable to legacies.

Residuary real estate is not applicable to satisfy pecuniary legacies, unless, by the operation of the rule in *Greville v. Browne*, or by some other direction of the testator, the legacies are charged upon the realty. *Mirchouse v. Scaife*, 2 M. & Cr. 695; *Gibbins v. Eyden*, 7 Eq. 371; *Collins v. Lewis*, 8 Eq. 708; *Dugdale v. Dugdale*, 14 Eq. 234; *Tomkins v. Colthurst*, 1 Ch. D. 626; *Farquharson v. Floyer*, 3 Ch. D. 109; not following *Hensman v. Fryer*, 3 Ch. 420.

Liability of land charged with payment of debts.

If the personalty is exhausted in payment of debts, pecuniary legatees may, by virtue of the doctrine of marshalling, stand in the place of creditors against real estate descended or charged with payment of debts. See under Marshalling.

Legacies charged on particular fund.

Legacies may be given in such a way as to be primarily chargeable upon some particular fund. If the particular fund is primarily liable, leaving the general personal estate liable if the fund is deficient, the legacies are demonstrative.

Charge on real estate.

Legacies may also be charged on real estate.



A direction to executors to realise such part of the testator's estate as they think right to pay legacies is to be limited to property which the executors take as such, and does not charge the real estate. *In re Cameron; Nixon v. Cameron*, 26 Ch. D. 19.

It would not be safe to assume that where land is devised to an executor beneficially, and he is directed to pay legacies, the land is charged with the legacies. It is a question of construction in each case. The direction to pay legacies may be so connected with the devise, or there may be such other indications of intention, as to charge the land.

Executor directed to pay legacies and devise of land to him.

A devise to the executor on condition of his paying a legacy (a), or with a request that he will see the will performed (b), or words whereby the testator charges the executor with payment of legacies (c), have been held to charge the legacies on the land devised to the executor; though, on the other hand, a direction that legacies were to be paid by the executor, to whom a specific devise of realty was made, followed by a gift to him of the residue of the personalty after payment of debts, has been held insufficient to create a charge (d). *Wigg v. Wigg*, 1 Atk. 382 (a); *Alcock v. Sparhawk*, 2 Vern. 228; 1 Eq. Ab. 198, pl. 4 (b); *Cross v. Kennington*, 9 B. 150; 10 Jur. 343; 15 L. J. Ch. 167 (where there was a devise of the residue of the realty) (c); *Parker v. Fearuley*, 2 S. & St. 592 (d); see also *Preston v. Preston*, 2 Jur. N. S. 1040; *Gallimore v. Gill*, 8 D. M. & G. 567.

It is now settled that a devise of the "residue" of the real and personal estate charges legacies upon the real estate. *Greville v. Browne*, 7 H. L. 689; *In re Bailey*, 12 Ch. D. 268, 274.

Devise of residue of realty creates a charge.

The words all real and personal estate not otherwise disposed of, or all other the real and personal estate, have the same effect. *Hassel v. Hassel*, 2 Dick. 527; *In re Bawden*; *National Provincial Bank of England v. Cresswell*, (1894) 1 Ch. 693; *In re Smith*; *Smith v. Smith*, (1899) 1 Ch. 365.

But there must be words such as residue or remainder, or similar words. Thus, a devise of all the testator's real estate and the residue of his personalty does not charge the

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Charge on  
fund subject  
to special  
power.

realty. *Wells v. Row*, 48 L. J. Ch. 476; *James v. Jones*, 9 L. R. Ir. 489.

On the same principle, where legacies are given and the testator gives the residue of the property belonging to him, or over which he has a power of appointment, the legacies are charged on property subject to a special power of appointment exercisable in favour of the legatees. *Gainsford v. Dunn*, 17 Eq. 405; see (1895) 1 Ch. 499.

It is not material whether interests in land have been already devised by the will or not (a), nor whether the residuary gift follows or precedes the legacies (b), and the rule applies to a legacy given by a codicil as an addition to a legacy given by the will (c). *Bench v. Biles*, 4 Mad. 187; *Francis v. Clemow*, Kay, 435; *Wheeler v. Howell*, 3 K. & J. 198 (a); *Elliott v. Dearsley*, 16 Ch. D. 322 (b); *Re Hall*; *Hall v. Hall*, 51 L. T. 86 (c).

The charge extends to real estate which is enumerated in the residuary devise. *Thorman v. Hillhouse*, 7 W. R. 332; 5 Jur. N. S. 563; *Bray v. Stevens*, 12 Ch. D. 162; see *Castle v. Gillett*, 16 Eq. 530.

The fact that the executors are directed to pay debts and legacies, the residuary realty and personalty being devised to other persons, does not take the case out of the rule. *In re Brooke*; *Brooke v. Rooke*, 3 Ch. D. 630.

Where the testator first deals exclusively with his personal estate and allots it out to different objects of his bounty in particular sums, these sums will not be charged on the realty by a residuary gift. *Gyett v. Williams*, 2 J. & H. 429.

Charge on  
realty in  
exoneration  
of personalty.

Legacies may also be charged on real estate in such a way as to make them payable only out of the real estate so charged in exoneration of the personalty. *Gittens v. Steele*, 1 Sw. 24; *Jones v. Bruce*, 11 Sim. 221; *Roberts v. Roberts*, 13 Sim. 330; *Ion v. Ashton*, 28 B. 379; *Dickin v. Edwards*, 4 Ha. 273; *Bessant v. Noble*, 26 L. J. Ch. 236; *In re Needham*; *Robinson v. Needham*, 54 L. J. Ch. 75.

Devisee of  
land subject  
to legacy not  
personally  
liable.

A devise of land subject to the payment of a legacy does not impose on the devisee a personal liability to pay the charge; and if he sells the land for its full value he is not bound to

account to the legatee for any part of the purchase-money. *Newman v. Kent*, 1 Mer. 240; 3 De G. & J. 511; *Jillard v. Edge*, 3 De G. & S. 502.

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The will may, of course, be so expressed as to impose a personal liability on the devisee if he accepts the devise. See, *e.g. Pickwell v. Spencer*, L. R. 7 Ex. 105.

No doubt annuities given in general terms are payable in the same way as legacies, and a general charge on real estate would not exonerate the personalty from its primary liability. *Boughton v. Boughton*, 1 H. L. 406.

Annuities given generally.

But where annuities were directed to be paid out of the rents and income of real and personal estate without any direction to convert the realty, the annuities were held payable out of both rateably, on the ground that the whole income was intended to be dealt with as one fund. *Falkner v. Grace*, 9 Ha. 282; *Howard v. Dryland*, 38 L. T. 24.

Annuities charged on income of realty and personalty.

And an annuity charged on freehold and leasehold estates specifically devised is payable rateably out of each according to their values at the testator's death. *Fielding v. Preston*, 1 De G. & J. 438.

Annuity charged on freeholds and leaseholds.

Where a jointure was charged on mineral property and on agricultural property devised to different devisees, it was held that the two properties must contribute to the jointure in proportion to the yearly income from each, and not in proportion to their capital values. *Ley v. Ley*, 6 Eq. 174.

In several cases questions have arisen how far a charge of legacies on real estate extends. Does it extend to real estate specifically devised, or must it be limited to residuary real estate? The question is one of construction.

How far charge of legacies on realty extends.

If land is specifically devised and legacies are then given and charged on the testator's real estate and there is residuary real estate, the natural inference is that the charge is intended only to affect the residuary real estate. *Spong v. Spong*, 1 Y. & J. 300; 3 Bl. N. S. 84; 1 D. & Cl. 365; *Conron v. Conron*, 7 H. L. 168; *Campbell v. McConaghey*, 1 R. 6 Eq. 20.

If there is no residuary devise, land specifically devised is charged. *Bank of Ireland v. McCarthy*, (1898) A. C. 181; see *Maskell v. Farrington*, 3 D. J. & S. 338; *Earl of*

Chap. LI. *Portarlington v. Damer*, 4 D. J. & S. 161; *Mannox v. Greener*, 14 Eq. 456.

If, however, legacies are charged on all the testator's real estate at the commencement of the will and specific devises are subsequently made, it may be more easy to infer that the land specifically devised was intended to be included in the charge. See *Mannox v. Greener*, 14 Eq. 456; *Cornwall v. Saurin*, 17 L. R. Ir. 595; *McCarthy v. McCartie*, (1897) 1 Ir. 86; *affd.* (1898) A. C. 181.

If there is a general charge of legacies on real estate by the will, land specifically devised by a codicil may be taken out of the charge in the will. *Wheeler v. Claydon*, 16 B. 169; *Quain v. Harrey*, 5 L. R. Ir. 622.

Rent-charge  
has priority  
over legacy.

And a rent-charge or annuity issuing out of the land has priority over legacies charged upon the land. *Creed v. Creed*, 11 Cl. & F. 491; *In re Briggs*; *Briggs v. George*, 29 W. R. 925; see *Coore v. Todd*, 7 D. M. & G. 520.

When  
sufficiency of  
personalty to  
be ascertained.

The question has also arisen whether, if the legacies are charged on realty if the personalty is insufficient and the personalty is sufficient at the death but becomes insufficient owing to a devastavit by the executor, the charge takes effect or not. The authorities in Ireland support the view that it does unless there is something in the will to limit the time when it is to be ascertained whether the charge has taken effect or not (a). Lord Romilly, on the other hand, took the opposite view (b). *In re Massy's Estate*, 14 Ir. Ch. 355; *In re Bradford's Estate*, (1895) 1 Ir. 251; *McCarthy v. McCartie*, (1897) 1 Ir. 86; affirmed on a different point, (1898) A. C. 181 (a); *Richardson v. Morton*, 13 Eq. 123 (b); see also *Hepworth v. Hall*, 30 B. 476. *Humble v. Humble*, 2 Jur. 696; *Howard v. Chaffers*, 2 Dr. & S. 236, perhaps support the Irish view, though there the defaulting executors were also devisees of the land.

No right to  
back rents.

A legatee who has a charge upon land can enforce his charge by appointment of a receiver, but he has no claim upon back rents received by the devisee. *Garfitt v. Allen*, 37 Ch. D. 48.

Legacies  
charged on  
land do not

If real estate is charged with the payment of legacies, and the real estate has to contribute to the payment of

the debts, the legacies must, nevertheless, be paid in full out of the real estate. *Raikes v. Boulton*, 29 B. 41; *In re Saunders Davies*; *Saunders Davies v. Saunders Davies*, 84 Ch. D. 482; *In re Bawden*; *National Provincial Bank of England v. Cresswell*, (1894) 1 Ch. 693.

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abate if part of land required for debts.

Difficulties used formerly to arise as to the currency in which a legacy was to be paid. For instance, if a testator domiciled in Jamaica or Ireland gave a legacy of 1,000*l.*, was the legacy to be paid in the currency of the domicile or in English currency? It was settled that the currency of the domicile must prevail. *Saunders v. Drake*, 2 Atk. 466; *Pierson v. Garnet*, 2 B. C. C. 39, 47; *Malcolm v. Martin*, 3 B. C. C. 50.

Legacy in foreign currency.

Such questions can no longer arise. But a somewhat similar question may still create a difficulty. Suppose a testator gives a legacy of 10,000 rupees or 20,000 francs to a legatee in England, how is the value to be ascertained? Is the legacy to be paid at the rate of exchange of the day, at the value of the rupee or franc as bullion, at the current value or how? In *Cockerell v. Barber*, 16 Ves. 461, where the testator was domiciled in India, it was held that the rupee was to be taken according to its current value without regard to the exchange or the expense of remittance, but the decision appears to leave a good many questions open. See *Manners v. Pearson & Son*, (1898) 1 Ch. 581.

If the funds available for payment of the pecuniary legacies are insufficient they must abate rateably, subject to any question of priority *inter se*.

Abatement of pecuniary legacies.

Legacy duty directed to be paid on a specific legacy is a general legacy and abates with the general legacies. *Farrer v. St. Catharine's Coll.*, 16 Eq. 19; see *Wilson v. O'Leary*, 17 Eq. 419; *In re Wilkins*; *Wilkins v. Rotherham*, 27 Ch. D. 703.

Legacy duty.

And annuities for the purpose of abatement rank with general legacies. *Miller v. Huddleston*, 3 Mac. & G. 513.

In estimating the value of annuities for purposes of abatement their value is to be taken at the time when the estimate is made; thus the value of the annuity of an annuitant who is dead is the sum of the payments which would have been

How the value of annuities is to be calculated.

## Chap. LI.

made to him in respect of it; and the value of a reversionary annuity which has come into possession is its present value according to the Government tables at the time of abatement, plus any arrears due on it. *Todd v. Bielby*, 27 B. 353; *Potts v. Smith*, 8 Eq. 683; *Delves v. Newington*, 52 L. T. 512.

The same rule applies where all the annuitants are living. *Heath v. Nugent*, 29 B. 226; *In re Wilkins*; *Wilkins v. Rotherham*, 27 Ch. D. 703.

Where legacies and annuities are charged on real estate, powers of distress and entry conferred upon the annuitants do not give the annuities priority over the legatees. *Roper v. Roper*, 3 Ch. D. 714.

Priority of general legacies, *inter se* :—

Legacies for valuable consideration have priority.

a. As between general legatees, legacies given for valuable consideration, as for debts or instead of dower, have priority. *Blower v. Morret*, 2 Ves. Sen. 420; *Heath v. Dendy*, 1 Russ. 543; *Norcott v. Gordon*, 14 Sim. 258; *Bell v. Bell*, 6 Ir. Eq. 239; *Davies v. Bush*, 1 You. 341; *Stahlschmidt v. Lett*, 1 Sm. & G. 421.

A legacy, however, in lieu of dower, where the testator has no land out of which the widow is dowable, or disposes of his land by his will so as to destroy her dower, has no priority. *Acey v. Simpson*, 5 B. 35; *Roper v. Roper*, 3 Ch. D. 714; *In re Greenwood*; *Greenwood v. Greenwood*, (1892) 2 Ch. 295.

A legacy to an executor for his trouble has no priority. *Duncan v. Watts*, 16 B. 204.

A legacy to the testator's wife for her immediate requirements has no priority. *Blower v. Morret*, 2 Ves. Sen. 420; *Cazenove v. Cazenove*, 61 L. T. 115; *In re Schweder's Estate*; *Oppenheim v. Schweder*, (1891) 3 Ch. 44. *In re Hardy*, 17 Ch. D. 798, must be considered overruled.

Time of payment creates no priority.

b. Legacies payable at the death of a tenant for life or at some other future period, do not abate before other legacies. *Miller v. Huddlestons*, 3 Mac. & G. 513; *Street v. Street*, 2 N. R. 56; *Nickisson v. Cockill*, 3 D. J. & S. 622.

Legacies introduced by "firstly," "secondly."

The words "in the first place," "in the next place," or the word "afterwards," used in introducing legacies, create no priority between them. *Thwaites v. Forman*, 1 Coll. 409;

*Beeston v. Booth*, 4 Mad. 161 ; *Whitehouse v. Insole*, 7 L. T. N. S. 400 ; see *In re Hardy* ; *Wells v. Barwick*, 17 Ch. D. 798. Chap. II.

Annuities to become payable when all the legacies are paid and annuities payable immediately abate *pari passu*. *Ingham v. Daly*, 9 L. R. Ir. 484.

c. But legacies given on the supposition that there will be more than enough to pay prior legacies abate first. *A.-G. v. Robins*, 2 P. W. 23 ; *Stammers v. Halliley*, 12 Sim. 42. Legacies given on supposition of a surplus.

And a direction that certain legacies given for life are to become applicable on the death of the legatees to the payment of other legacies will give the legatees for life priority. *Brown v. Brown*, 1 Kee. 275 ; see *Haynes v. Haynes*, 3 D. M. & G. 590. Legacies for life applicable on the death of the legatees.

A legacy may be given in such a way as to be itself what may be called a residuary legacy so as not to be payable till the other legacies have been paid ; for instance, if legacies are given generally and then the residue is given upon trust to pay further legacies. *In re Malone* ; *Browne v. Malone*, (1897) 1 Ir. 571 ; *In re Smith* ; *Smith v. Smith*, (1899) 1 Ch. 365. Residuary legacy.

When a particular legacy is given and the residue is then distributed in certain sums, the particular legacy has priority over all the others. *Gyett v. Williams*, 2 J. & H. 429 ; see *In re Hardy* ; *Wells v. Barwick*, 17 Ch. D. 798.

Priority between general and residuary legatees :—

a. As a general rule, the residuary legatee is entitled to nothing till all the particular legacies given by the will are satisfied in full. General legacies have priority over residue.

Where a fund is set apart to pay annuities and is directed upon the death of the annuitants respectively to fall into the residue, if the fund is insufficient to pay the annuities, the residuary legatee is entitled to nothing till all the legacies and annuities have been paid in full. *Arnold v. Arnold*, 2 M. & K. 374 ; *Anderson v. Anderson*, 33 B. 223 ; *In re Tootal's Estate*, 2 Ch. D. 628. Fund set apart to pay annuities.

And when two legacies are directed to be paid out of a fund which turns out too small to pay both, and one of them lapses,

Chap. II.Direction for  
abatement.

the other legacy gets the benefit of the lapse. *In re Tunno ; Raikes v. Raikes*, 45 Ch. D. 66.

b. It would seem that a direction that in the event of insufficiency of assets all the beneficiaries are to abate, does not entitle the residuary legatee to a fund which is released by the death of a tenant for life. *In re Lyne's Estate ; Sands v. Lyne*, 8 Eq. 482.

On the other hand, if annuities are directed to abate in favour of legatees or *vice versâ*, in the event of deficient assets the abatement is permanent, and a fund falling in is not applicable to increase gifts which have abated. *Farmer v. Mills*, 4 Russ. 86 ; *Hichens v. Hichens*, 25 W. R. 249.

Loss of assets  
falls on the  
residue.

c. Upon similar principles, where assets have been lost after the death of the testator, the loss falls on the residuary legatee in the first instance. *Wilnot v. Jenkins*, 1 B. 401 ; *Baker v. Farmer*, L. R. 3 Ch. 537. *Dyose v. Dyose*, 1 P. W. 305, is overruled ; see *Fonnereau v. Poyntz*, 1 B. C. C. 478 ; *Humphreys v. Humphreys*, 2 Cox, 186 ; *Baker v. Farmer*, *supra*.

Where assets are wasted after some legacies have been satisfied, the satisfied legatees cannot be called on to refund by the other legatees ; and similarly if assets are wasted after one of several residuary legatees has received his share, he cannot be called on to refund by the other residuary legatees. *Fenwick v. Clarke*, 4 D. F. & J. 240 ; *Peterson v. Peterson*, 3 Eq. 111 ; *In re Winslow ; Frere v. Winslow*, 45 Ch. D. 349 ; *In re Lepine ; Downsett v. Culver*, (1892) 1 Ch. 210.

## F. MARSHALLING.

## I. General rules.

Principle  
stated.

The principle as stated by Lord Eldon is "that if a party has two funds . . . a person having an interest in one only, has a right in equity to compel the former to resort to the other, if that is necessary for the satisfaction of both." *Aldrich v. Cooper*, 8 Ves. 382, 388, and see *Tombs v. Roch*, 2 Coll. 490.

Legacies with  
and without  
charge on land.

Thus if one legacy is charged upon land and others not, and the personalty is exhausted in paying the legacies, the legatees who have no charge on the land are entitled to the extent to



which the personalty has been exhausted in paying the legacy charged upon the land to stand against the land. *Hanby v. Roberts*, Amb. 127; *S. C. sub nom. Hanby v. Fisher*, 1 Dick. 104; *S. C. sub nom. Hanby v. Fisher*, 2 Coll. 512.

But there can be no marshalling in respect of a legacy which fails as a charge upon the land by the death of the legatee before the time of payment. *Prowse v. Abingdon*, 1 Atk. 482; *Pearce v. Loman*, 3 Ves. 135.

It follows from the principle already stated that where the personalty is exhausted in payment of debts, pecuniary legatees may, to the extent of the debts paid out of the personalty, come against real estate descended (a). They may also come against real estate charged with payment of debts, whether the charge is an express charge or only inferred from a general direction to pay debts (b). It is to be noticed that inasmuch as a charge of debts does not exonerate the personalty from its primary liability to pay debts, the personalty has been applied in its proper order. But the doctrine is now too well settled to be open to discussion. *Hanby v. Roberts*, Amb. 127 (a); *Haslewood v. Pope*, 3 P. W. 322; *Arnold v. Chapman*, 1 Ves. Sen. 108, 110; *Foster v. Cook*, 3 B. C. C. 347; *Bradford v. Foley*, 3 B. C. C. 351, n.; *Webster v. Alsop*, 3 B. C. C. 352, n.; *Aldrich v. Cooper*, 8 Ves. 381, 396; *Paterson v. Scott*, 1 D. M. & G. 531; *Rickard v. Barrett*, 3 K. & J. 289; *Surtees v. Parkin*, 19 B. 406; *Re Stokes*; *Parsons v. Miller*, 67 L. T. 223; *In re Salt*; *Brothwood v. Keeling*, (1895) 2 Ch. 203; not following *Re Bate*; *Bate v. Bate*, 43 Ch. D. 600; and see *In re Butler*; *Le Bas v. Herbert*, (1894) 3 Ch. 250 (b).

Similarly, under the old law, if a mortgage on a devised estate was paid off out of the personalty, the pecuniary legatees, to the extent to which they were disappointed, were entitled to stand in the place of the mortgagee against the devised estate. *Lutkins v. Leigh*, Ca. t. Talb. 53; *Forrester v. Leigh*, Amb. 171; *Wythe v. Henniker*, 2 M. & K. 635; *Johnson v. Child*, 4 Ha. 87; *Binns v. Nicholls*, L. R. 2 Eq. 256.

Pecuniary legatees had the same right as regards a vendor's lien upon land purchased by the testator and paid for out of the personalty whether the land descended (a) or was

Chap. II.

When pecuniary legatees may go against realty descended or devised subject to a charge of debts.

When pecuniary legatees may claim against mortgaged estate.

Vendor's lien.

Chap. II.

devised (b). *Sproule v. Prior*, 8 Sim. 189 (a); *Birds v. Askey*, 24 B. 618; *Lord Lilford v. Powys Keck*, L. R. 1 Eq. 347; not following *Wythe v. Henniker*, 2 M. & K. 635 (b).

A direction that mortgage debts are to be paid out of the personalty does not deprive pecuniary legatees of the right to claim against the mortgaged estate so far as the personalty is exhausted in paying the mortgage. *Percher v. Wilson*, 14 W. R. 1011; *In re Smith*; *Smith v. Smith*, (1899) 1 Ch. 365; not following *Smith v. Smith*, 10 Ir. Ch. 89, 461.

If an annuity is charged upon land only which is taken by a mortgagee, the annuitant may stand against the personal estate subject to the payment of the legacies given by the will. *Buckley v. Buckley*, 19 L. R. Ir. 544.

Between  
legatees and  
residuary  
devisees.

Pecuniary legatees are not entitled to have the assets marshalled against residuary devisees, where the land is not charged with debts. *Collins v. Lewis*, 8 Eq. 708; *Dugdale v. Dugdale*, 14 Eq. 234; *Tomkins v. Colthurst*, 1 Ch. D. 626; *Farquharson v. Floyer*, 3 Ch. D. 109; not following on this point *Hensman v. Fryer*, 3 Ch. 420.

Judgment  
charged on  
land held  
in tail.

As regards judgments which are a charge on the testator's own land, and on land of which he was tenant in tail, an annuitant having a charge on the testator's property under his will cannot throw the judgment debts on the entailed estate, on the ground that the issue in tail are entitled to have the debts paid out of the testator's own property. *Douglas v. Cooksey*, 1 R. 2 Eq. 311.

## II. Marshalling in case of charities.

Court did not  
marshal  
in favour of  
a charity.

Under the law as it was before the Mortmain and Charitable Uses Act, 1891, it was settled that the Court would not marshal assets in favour of a charity unless the testator gave express directions to do so. For instance, the debts could not be cast on the impure personalty so as to increase the pure personalty for the benefit of a charity. The reason was that "the assets cannot be marshalled to support a legacy contrary to law" (see *Mogg v. Hodges*, 1 Ves. Sen. 52), or the Court will not "do *per obliquum* what could not be done *per directum*." *A.-G. v. Tyndall*, Amb. 614.

Now, however, as impure personalty and even land may

be given to charity, the reason for the rule has fallen away, and it seems that if the occasion were to arise assets would be marshalled in favour of a charity. They will be marshalled in Ireland, where the Mortmain Act did not apply. *Biggar v. Eastwood*, 19 L. R. Ir. 49.

The result of the old cases may be shortly stated here.

In the absence of an intention to marshal charitable legacies abated in the proportion of the pure to the impure personalty, the value being taken as at the testator's death. *Calvert v. Armitage*, 2 H. & M. 446; *Luckcraft v. Pridham*, 48 L. J. Ch. 686, 689.

Charitable legacies abate.

A gift of the residue to charity, except so much as could not by law be so appropriated, does not amount to a direction to marshal. *Edwards v. Hall*, 11 Ha. 1, 22; see 6 D. M. & G. 74; *In re Somers Cocks*; *Wegg-Prosser v. Wegg-Prosser*, (1895) 2 Ch. 449.

A direction that the charities are to be paid out of pure personalty gives them priority over other legatees as regards the pure personalty, but does not release the pure personalty from bearing its proportion of the debts. *Robinson v. Geldard*, 3 De G. & S. 499; 3 Mac. & G. 735; *Tempest v. Tempest*, 2 K. & J. 635; 7 D. M. & G. 470; *Beaumont v. Oliveira*, 6 Eq. 534; 4 Ch. 309; *Lewis v. Boetefour*, 38 L. T. 93; *affd.* W. N. 1879, 11; see *Nickisson v. Cockill*, 3 D. J. & S. 622.

Direction to pay out of pure personalty.

But where the testator devised his real estate upon trust to pay debts and funeral and testamentary expenses, and gave his personalty on trust to pay so much of the debts, &c. as the realty was insufficient to pay, and then gave the residue to charity with a direction that it should include only such parts of his property as could be lawfully given to charity, it was held that it followed by necessary implication that the impure personalty must be applied in paying debts before the pure personalty. *Wills v. Bourne*, 16 Eq. 487.

Implied direction to marshal.

And a direction that the pure personalty shall be reserved for the charities (a), or that they be paid exclusively out of pure personalty (b), or that the pure personalty is to be first applied in paying them (c), is in effect a direction to marshal.

Direction to reserve or pay exclusively or first out of pure personalty.

**Chap. LI.**

*Miles v. Harrison*, 9 Ch. 316 (a); *In re Arnold; Ravenscroft v. Workman*, 37 Ch. D. 637 (b); *In re Pitt; Lacy v. Stone*, 33 W. R. 653 (c).

Pure personalty may be given specifically.

And a gift to charity of so much of the testator's estate as can lawfully be given to charity may be a specific gift and liable to debts only in the order in which property specifically given is applicable. *Shepherd v. Beetham*, 6 Ch. D. 597.

If the pure personalty is exonerated from debts, it must, nevertheless, bear its share of the costs of administration if they are not otherwise provided for. *In re Fitzgerald; Adolph v. Dolman*, 26 W. R. 53.

## APPENDIX.

### 1 VIC. CAP. 26.

#### AN ACT FOR THE AMENDMENT OF THE LAWS WITH RESPECT TO WILLS [3RD JULY, 1837].

THE Words and Expressions hereinafter mentioned, which in their ordinary Signification have a more confined or a different Meaning, shall in this Act, except where the Nature of the Provision or the Context of the Act shall exclude such Construction, be interpreted as follows: (that is to say,) the Word "Will" shall extend to a Testament, and to a Codicil, and to an Appointment by Will or by Writing in the Nature of a Will in exercise of a Power, and also to a Disposition by Will and Testament or Devise of the Custody and Tuition of any Child, by virtue of an Act passed in the Twelfth Year of the Reign of King *Charles* the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite, and by Knight's Service, and Purveyance, and for Settling a Revenue upon His Majesty in lieu thereof*, or by virtue of an Act passed in the Parliament of Ireland in the Fourteenth and Fifteenth Years of the Reign of King *Charles* the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knight's Service*, and to any other Testamentary Disposition; and the words "Real Estate" shall extend to Manors, Adowsons, Messnages, Lands, Tithes, Rents, and Hereditaments, whether Freehold, Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether corporeal, incorporeal, or personal, and to any undivided Share thereof, and to any Estate, Right, or Interest (other than a Chattel Interest) therein; and the Words "Personal Estate" shall extend to Leasehold Estates and other Chattels Real, and also to Monies, Shares of Government and other Funds, Securities for Money (being not Real Estates), Debts, Choses in Action, Rights, Credits, Goods, and all other Property whatsoever, which by Law devolves upon the Executor or Administrator, and to any Share or Interest therein; and every Word importing the Singular Number only shall extend and be applied to Several Persons or Things as well as one Person or Thing; and every Word importing the Masculine Gender only shall extend and be applied to a Female as well as a Male.

8. It shall be lawful for every Person to devise, bequeath, or dispose of, by his Will executed in manner herein-after required, all Real Estate, and all Personal Estate which he shall be entitled to, either at Law or in Equity, at the Time of his Death, and

#### Appendix.

Meaning of  
certain words  
in this Act:

"Will:"

12 Car. 2,  
c. 24.

14 & 15 Car.  
2 (I.).

"Real  
Estate:"

"Personal  
Estate:"

Number:

Gender.

All property  
may be dis-  
posed of by  
Will, compris-  
ing Customary

**Appendix.**

Freeholds and Copyholds without Surrender, and before Admission, and also such of them as cannot now be devised ;

Estates *pur autre vie* ;

Contingent Interests ;

Rights of Entry ; and Property acquired after Execution of the Will.

As to the Fees and Fines payable by Devisees of Customary and Copyhold Estates.

which, if not so devised, bequeathed, or disposed of would devolve upon the Heir at Law, or Customary Heir of him, or, if he became entitled by Descent, of his Ancestor, or upon his Executor or Administrator ; and the power hereby given shall extend to all Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, notwithstanding that the Testator may not have surrendered the same to the Use of his Will, or notwithstanding that, being entitled as Heir, Devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a Custom to devise or surrender to the Use of a Will or otherwise, could not at Law have been disposed of by Will if this Act had not been made, or notwithstanding that the same, in consequence of there being a Custom that a Will or a Surrender to the Use of a Will should continue in force for a limited Time only, or any other special Custom, could not have been disposed of by Will according to the Power contained in this Act, if this Act had not been made : and also to Estates *pur autre vie*, whether there shall or shall not be any special Occupant thereof, and whether the same shall be Freehold, Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether the same shall be a corporeal or an incorporeal Hereditament ; and also to all contingent, executory, or other future Interests in any Real or Personal Estate, whether the Testator may or may not be ascertained as the Person or one of the Persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any Disposition thereof by Deed or Will ; and also to all Rights of Entry for Conditions broken, and other Rights of Entry ; and also to such of the same Estates, Interests, and Rights respectively, and other Real and Personal Estate, as the Testator may be entitled to at the time of his Death, notwithstanding that he may become entitled to the same subsequently to the Execution of his Will.

4. Provided always, that where any Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, might, by the Custom of the Manor of which the same is holden, have been surrendered to the Use of a Will, and the Testator shall not have surrendered the same to the use of his Will, no person entitled or claiming to be entitled thereto by virtue of such Will shall be entitled to be admitted, except upon payment of all such Stamp Duties, Fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such Real Estate to the Use of the Will, or in respect of presenting, registering, or enrolling such Surrender, if the same Real Estate had been surrendered to the Use of the Will of such Testator : Provided also that where the Testator was entitled to have been admitted to such Real Estate, and might, if he had been admitted thereto, have surrendered the same to the Use of his Will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such Real Estate in consequence of such Will shall be entitled to be admitted to the same Real Estate by virtue thereof, except on Payment of all such Stamp Duties, Fees, Fine, and Sums of Money as would have been

lawfully due and payable in respect of the admittance of such Testator to such Real Estate, and also of all such Stamp Duties, Fees, and Sums of Money, as would have been lawfully due and payable in respect of surrendering such Real Estate to the Use of the Will, or of presenting, registering, or enrolling such Surrender, had the Testator been duly admitted to such Real Estate, and afterwards surrendered the same to the Use of his Will ; all which Stamp Duties, Fees, Fine, or Sums of Money due as aforesaid shall be paid in addition to the Stamp Duties, Fees, Fine, or Sums of Money due or payable on the Admittance of such Person so entitled or claiming to be entitled to the same Real Estate as aforesaid.

5. When any Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, shall be disposed of by Will, the Lord of the Manor or reputed Manor of which such Real Estate is holden, or his Steward, or the Deputy of such Steward, shall cause the Will by which such Disposition shall be made, or so much thereof as shall contain the Disposition of such Real Estate, to be entered on the Court Rolls of such Manor or reputed Manor ; and when any Trusts are declared by the Will of such Real Estate, it shall not be necessary to enter the Declaration of such Trusts, but it shall be sufficient to state in the Entry on the Court Rolls that such Real Estate is subject to the Trusts declared by such Will ; and when any such Real Estate could not have been disposed of by Will if this Act had not been made, the same Fine, Heriot, Dues, Duties, and Services shall be paid and rendered by the Devisee as would have been due from the Customary Heir in case of the Descent of the same Real Estate, and the Lord shall as against the Devisee of such Estate have the same Remedy for recovering and enforcing such Fine, Heriot, Dues, Duties, and Services as he is now entitled to for recovering and enforcing the same from or against the Customary Heir in case of a Descent.

6. If no Disposition by Will shall be made of any Estate *pur autre vie* of a Freehold Nature, the same shall be chargeable in the Hands of the Heir, if it shall come to him by reason of special Occupancy, as Assets by Descent, as in the case of Freehold Land in Fee Simple ; and in case there shall be no special Occupant of any Estate *pur autre vie*, whether Freehold or Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether a corporeal or incorporeal Hereditament, it shall go to the Executor or Administrator of the Party that had the Estate thereof by virtue of the Grant ; and if the same shall come to the Executor or Administrator either by reason of a special Occupancy or by virtue of this Act, it shall be assets in his Hands, and shall go and be applied and distributed in the same Manner as the Personal Estate of the Testator or Intestate.

7. No Will made by any Person under the Age of Twenty-one Years shall be valid.

8. Provided also that no Will made by any Married Woman shall be valid, except such a Will as might have been made by a Married Woman before the passing of this Act.

9. No Will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned ; (that is to say,) it shall

# Appendix.

Wills or  
Extracts of  
Wills of  
Customary  
Freeholds and  
Copyholds to  
be entered on  
the Court  
Rolls ;

and the Lord  
to be entitled  
to the same  
Fine, &c.,  
when such  
Estates are  
not now  
devisable, as  
he would have  
been from the  
Heir in case  
of Descent.

Estates *pur  
autre vie*.

No Will of a  
minor valid ;  
nor of a Feme  
Covert, except  
such as might  
now be made.  
Every Will  
shall be in

**Appendix.**

Writing, and  
signed by the  
Testator and  
attested.

Appointments  
by Will to be  
executed like  
other Wills.

Soldiers' and  
Mariners'  
Wills  
excepted.

Publication  
not to be  
requisite.

Incompetency  
of attesting  
Witness not  
to avoid will.

Gifts to an  
attesting  
Witness to  
be void.

Creditor  
attesting to be  
admitted a  
Witness.

Executor to  
be admitted  
a Witness.

Will to be  
revoked by  
Marriage.

be signed at the Foot or End thereof by the Testator or by some other Person in his Presence and by his Direction ; and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary.

10. No appointment made by Will, in exercise of any Power, shall be valid, unless the same be executed in manner herein-before required ; and every Will executed in manner herein-before required shall, so far as respects the execution and attestation thereof, be a valid execution of a Power of Appointment by Will, notwithstanding it shall have been expressly required that a Will made in exercise of such Power should be executed with some additional or other Form of Execution or Solemnity.

11. Provided always, that any Soldier being in actual Military Service, or any Mariner or Seaman being at Sea, may dispose of his Personal Estate as he might have done before the making of this Act.

13. Every Will executed in manner herein-before required shall be valid without any other Publication thereof.

14. If any person who shall attest the Execution of a Will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a Witness to prove the Execution thereof, such Will shall not on that Account be invalid.

15. If any Person shall attest the Execution of any Will to whom or to whose Wife or Husband any beneficial Devise, Legacy, Estate, Interest, Gift, or Appointment, of or affecting any Real or Personal Estate (other than and except Charges and Directions for the Payment of any Debt or Debts), shall be thereby given or made, such Devise, Legacy, Estate, Interest, Gift, or Appointment shall, so far only as concerns such Person attesting the Execution of such Will, or the Wife or Husband of such Person, or any person claiming under such Person or Wife or Husband, be utterly null and void, and such Person so attesting shall be admitted as a Witness to prove the Execution of such Will, or to prove the Validity or Invalidity thereof, notwithstanding such Devise, Legacy, Estate, Interest, Gift, or Appointment mentioned in such Will.

16. In case by any Will any Real or Personal Estate shall be charged with any Debt or Debts, and any Creditor, or the Wife or Husband of any Creditor, whose Debt is so charged, shall attest the Execution of such Will, such Creditor notwithstanding such Charge shall be admitted a Witness to prove the Execution of such Will, or to prove the Validity or Invalidity thereof.

17. No person shall, on account of his being an Executor of a Will, be incompetent to be admitted a Witness to prove the Execution of such will, or a Witness to prove the Validity or Invalidity thereof.

18. Every Will made by a man or Woman shall be revoked by his or her Marriage (except a Will made in exercise of a Power of Appointment, when the Real or Personal Estate thereby appointed would not in default of such Appointment pass to his or her Heir,



Customary Heir, Executor, or Administrator, or the person entitled as his or her next of Kin, under the Statute of Distributions).

19. No Will shall be revoked by any presumption of an Intention on the Ground of an Alteration in Circumstances.

20. No Will or Codicil, or any Part thereof, shall be revoked otherwise than as aforesaid, or by another Will or Codicil executed in manner herein-before required, or by some Writing declaring an Intention to revoke the same, and executed in the Manner in which a Will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the Testator, or by some Person in his Presence and by his Direction, with the intention of revoking the same.

21. No Obliteration, Interlineation, or other Alteration made in any Will after the Execution thereof shall be valid or have any Effect, except so far as the Words or Effect of the Will before such Alteration shall not be apparent, unless such Alteration shall be executed in like Manner as herein-before is required for the Execution of the Will; but the Will, with such Alteration as Part thereof, shall be deemed to be duly executed if the Signature of the Testator and the Subscription of the Witnesses be made in the Margin or on some other Part of the Will opposite or near to such Alteration, or at the Foot or End of or opposite to a Memorandum referring to such Alteration, and written at the end or some other Part of the Will.

22. No Will or Codicil, or any Part thereof, which shall be in any Manner revoked, shall be revived otherwise than by the Re-execution thereof, or by a Codicil executed in manner herein-before required, and showing an Intention to revive the same; and when any Will or Codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such Revival shall not extend to so much thereof as shall have been revoked before the Revocation of the whole thereof, unless an Intention to the contrary shall be shown.

23. No Conveyance or other Act made or done subsequently to the Execution of a Will of or relating to any Real or Personal Estate therein comprised, except an Act by which such Will shall be revoked as aforesaid, shall prevent the Operation of the Will with respect to such Estate or Interest in such Real or Personal Estate as the Testator shall have power to dispose of by will at the Time of his Death.

24. Every Will shall be construed, with reference to the Real Estate and Personal Estate comprised in it, to speak and take effect as if it had been executed immediately before the Death of the Testator, unless a contrary Intention shall appear by the Will.

25. Unless a contrary Intention shall appear by the Will, such Real Estate or Interest therein as shall be comprised or intended to be comprised in any Devise in such Will contained, which shall fail or be void by reason of the Death of the Devisee in the lifetime of the Testator, or by reason of such Devise being contrary to Law or otherwise incapable of taking effect, shall be included in the Residuary Devise (if any) contained in such Will.

26. A Devise of the Land of the Testator, or of the Land of the Testator in any Place or in the Occupation of any Person mentioned

#### Appendix.

No Will to be revoked by Presumption.

No Will to be revoked but by another Will or Codicil, or by a Writing executed like a Will, or by Destruction.

No alteration in a Will shall have any Effect unless executed as a Will.

No Will revoked to be revived otherwise than by Re-execution or a Codicil to revive it.

A Devise not to be rendered inoperative by any subsequent Conveyance or Act.

A Will shall be construed to speak from the Death of the Testator.

A Residuary Devise shall include Estates comprised in lapsed and void Devises.

A general Devise of

**Appendix.**

the Testator's Lands shall include Copyhold and Leasehold as well as Freehold Lands.

A general Gift shall include Estates over which the Testator has a general Power of Appointment.

A Devise without any Words of Limitation shall be construed to pass the Fee. The Words "die without Issue," or "die without leaving Issue," shall be construed to mean die without issue living at the Death.

No Devise to Trustees or Executors, except for a Term or a Presentation to a Church shall pass a Chattel Interest.

in his Will, or otherwise described in a general Manner, and any other general Devise which would describe a Customary, Copyhold, or Leasehold Estate if the Testator had no Freehold Estate which could be described by it, shall be construed to include the Customary, Copyhold, and Leasehold Estates of the Testator, or his Customary, Copyhold, and Leasehold Estates, or any of them, to which such Description shall extend, as the Case may be, as well as Freehold Estates, unless a contrary Intention shall appear by the Will.

27. A general Devise of the Real Estate of the Testator, or of the Real Estate of the Testator in any Place or in the occupation of any person mentioned in his Will, or otherwise described in a general Manner, shall be construed to include any Real Estate, or any Real Estate to which such Description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an Execution of such Power, unless a contrary Intention shall appear by the Will; and in like Manner a Bequest of the Personal Estate of the Testator, or any Bequest of Personal Property described in a general Manner, shall be construed to include any Personal Estate, or any Personal Estate to which such Description shall extend (as the Case may be), which he may have power to appoint in any Manner he may think proper, and shall operate as an Execution of such Power, unless a contrary Intention shall appear by the Will.

28. Where any Real Estate shall be devised to any Person without any words of Limitation, such Devise shall be construed to pass the Fee Simple, or other the whole Estate or Interest which the Testator had Power to dispose of by Will in such Real Estate, unless a contrary Intention shall appear by the Will.

29. In any devise or Bequest of Real or Personal Estate the Words "die without Issue," or "die without leaving Issue," or "have no Issue," or any other words which may import either a Want or Failure of Issue of any Person in his Lifetime, or at the Time of his Death, or an indefinite Failure of his Issue, shall be construed to mean a Want or Failure of Issue in the Lifetime or at the Time of the Death of such Person, and not an indefinite Failure of his Issue, unless a contrary Intention shall appear by the Will, by reason of such Person having a Prior Estate Tail or of a preceding Gift, being (without any Implication arising from such Words,) a Limitation of an Estate Tail to such Person or Issue, or otherwise; Provided, that this Act shall not extend to Cases where such Words as aforesaid import if no Issue described in a preceding Gift shall be born, or if there shall be no Issue who shall live to attain the Age or otherwise answer the Description required for obtaining a vested Estate by a preceding Gift to such Issue.

30. Where any Real Estate (other than or not being a Presentation to a Church) shall be devised to any Trustee or Executor, such devise shall be construed to pass the Fee Simple or other the whole Estate or interest which the Testator had power to dispose of by Will in such Real Estate, unless a definite Term of Years, absolute or determinable, or an Estate of Freehold, shall thereby be given to him expressly or by Implication.

31. Where any Real Estate shall be devised to a Trustee, without any express Limitation of the Estate to be taken by such Trustee, and the beneficial Interest in such Real Estate, or in the surplus Rents and Profits thereof, shall not be given to any Person for Life, or such beneficial Interest shall be given to any Person for Life, but the Purposes of the Trust may continue beyond the Life of such Person, such Devise shall be construed to vest in such Trustee the Fee Simple, or other the whole legal Estate, which the Testator had Power to dispose of by Will in such Real Estate, and not an Estate determinable when the Purposes of the Trust shall be satisfied.

32. Where any Person to whom any Real Estate shall be devised for an Estate Tail or an Estate in quasi Entail shall die in the lifetime of the Testator leaving Issue who would be inheritable under such Entail, and any such Issue shall be living at the Time of the Death of the Testator, such Devise shall not lapse, but shall take effect as if the Death of such Person had happened immediately after the Death of the Testator, unless a contrary Intention shall appear by the Will.

33. Where any Person being a Child or other Issue of the Testator to whom any Real or Personal Estate shall be devised or bequeathed for any Estate or Interest not determinable at or before the Death of such Person shall die in the Lifetime of the Testator leaving Issue, and any such Issue of such Person shall be living at the Time of the Death of the Testator, such Devise or Bequest shall not lapse, but shall take effect as if the Death of such Person had happened immediately after the Death of the Testator, unless a contrary Intention shall appear by the Will.

34. This Act shall not extend to any Will made before the First Day of January, One thousand eight hundred and thirty-eight, and every Will re-executed or republished, or revived by any Codicil, shall for the Purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and this Act shall not extend to any Estate *pur autre vie* of any Person who shall die before the First Day of January, One thousand eight hundred and thirty-eight.

35. This Act shall not extend to *Scotland*.

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Trustees under an unlimited Devise, where the Trust may endure beyond the Life of a Person beneficially entitled for Life, to take the Fee.

Devises of Estates Tail shall not lapse.

Gifts to Children or other Issue who leave Issue living at the Testator's Death shall not lapse.

Act not to extend to Wills made before 1838 nor to Estates *pur autre vie* of Persons who die before 1838.

Act not to extend to Scotland.



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